Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

MULL & MULL, PLC,

Petitioner,

v.

RHONE-POULENC RORER, INC.;
BAXTER HEALTHCARE COMPANY;
ALPHA THERAPEUTIC CORPORATION; and
BAYER CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a court have subject matter jurisdiction or authority to certify a "settlement only" class and bind unnamed parties to a subsequently approved class settlement when it has previously been determined that no litigation class is possible?

2. Can the court's lack of subject matter jurisdiction or authority to bind unnamed parties to an unlawful class settlement be raised by such parties in defense to an injunction issued to command compliance with that settlement?

3. Are attorneys appearing solely in a representative capacity bound by a court order approving a settlement between their clients and a third party merely because they failed to object to the settlement in order to advance their clients' interests?

CERTIFICATE OF INTERESTED PARTIES

1) **Parties**

(A) Rhone-Poulenc Rorer, Inc.

(B) Bayer Corporation

(C) Baxter Healthcare Company

(D) Alpha Therapeutic Corporation

(E) Mull & Mull, A Professional Law Corporation

2) **Corporate Information**

(A) Rhone-Poulenc Rorer, Inc.

(i) Rhone-Poulenc Rorer Inc.'s parent is Rhone-Poulenc S.A.

(ii) No publicly held companies own 10% or more of the stock of Rhone-Poulenc Rorer Inc., except its parent Rhone-Poulenc S.A.

(B) Armour Pharmaceutical Company

(i) Armour Pharmaceutical Company's parent is Rhone-Poulenc Rorer International (Holdings) Inc.

(ii) No publicly held companies own 10% or more of the stock of Armour Pharmaceutical Company. Rhone-Poulenc Rorer, Inc., which owns 100% of the stock in Armour Pharmaceutical Company's parent Rhone-Poulenc Rorer International (Holdings) Inc., has issued shares of stock to the public.

(C) Bayer Corporation

(i) Bayer Corporation's parent is Bayer A.G.

(ii) Bayer A.G. owns 100% of the stock of Bayer Corporation.

CERTIFICATE OF INTERESTED PARTIES – Continued

(D) Baxter Healthcare Corporation

(i) Baxter Healthcare Corporation's parent is Baxter International, Inc.

(ii) Baxter International, Inc. owns 100% of the stock of Baxter Healthcare Corporation.

(E) Alpha Therapeutic Corporation

(i) Alpha Therapeutic Corporation's parent is Green Cross Corporation of America.

(ii) Green Cross Corporation of America owns 100% of the stock of Alpha Therapeutic Corporation.

(F) Mull & Mull

(i) Mull & Mull is wholly owned by Thomas and Lorraine Mull.

3) Law Firms

(A) Rhone-Poulenc Rorer, Inc.

(i) Sidley & Austin

(B) Armour Pharmaceutical Company

(i) Sidley & Austin

(C) Bayer Corporation

(i) O'Connor, Cohn, Dillon & Barr

(ii) Geoffrey R.W. Smith, Esq.

(D) Baxter Healthcare Corporation

(i) Dechert, Price & Rhoads

CERTIFICATE OF INTERESTED PARTIES – Continued

(E) Alpha Therapeutic Corporation

(i) Knapp, Petersen & Clarke

(F) Mull & Mull

(i) Barham & Arceneaux

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES: MAY IT PLEASE THE COURT:

Petitioner, Mull & Mull, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit entered in this matter on October 29, 1998.

CITATION OF LOWER COURT OPINIONS

The district court order in this case, entered on February 18, 1998 in *Walker v. Bayer Corporation*, No. 96-C-5024 (N.D.Ill.), is unreported. It is reproduced in the Appendix attached hereto at App. 11-29.

The decision rendered by the United States Court of Appeals for the Seventh Circuit on October 19, 1998 in this case is reported at 159 F.3d 1016. It is also reproduced in the Appendix attached hereto at App. 1-9.

STATEMENT OF JURISDICTION

This is an appeal from an order entered by the United States District Court for the Northern District of Illinois on February 18, 1998 in *Walker v. Bayer Corporation, et al.*, 96-C-5024 (N.D.Ill.). Jurisdiction was based on 28 U.S.C. §1332. Mull & Mull appealed on February 24, 1998.

The United States Court of Appeals for the Seventh Circuit affirmed the district court decision on October 19, 1998. Co-appellants Roy Spece and Rose Ibanez timely petitioned for rehearing on November 2, 1998. The Court

of Appeals denied the petition for rehearing on November 4, 1998.

This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS

Article III, §2, Clause 1 of the United States Constitution provides, in relevant part:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .

RECORD CITATIONS

The citations to the Appendix attached hereto are demarcated as "App. ___." Citations to the record before the lower courts are demarcated as "Mand. App. ___," referring to the appendix attached to the petition for writ of mandamus consolidated with these appeals in the United States Court of Appeals for the Seventh Circuit, and "R.App. ___," referring to the record on appeal.

STATEMENT OF THE CASE

In 1994, a group of plaintiffs in the multi-district litigation known as *In re Factor VIII Blood Concentrate Litigation*, then pending in the Northern District of Illinois, attempted to certify a litigation class to try their claims against the Fractionator-defendants. District Judge

John F. Grady agreed to certify a class to try the sole issue of the "ordinary negligence" of the Fractionators. *See Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 175 F.R.D. 410 (N.D.Ill. 1994). The Fractionators vigorously opposed this certification, *see* App. 129 *et seq.*, and subsequently petitioned the Seventh Circuit Court of Appeals for a writ of mandamus to reverse that decision.

The Court of Appeals granted the petition and decertified the class. Important to its decision was the finding that the individual issues relevant to each case precluded the certification of a class even to try the limited issue of negligence. Judge Posner, writing for the Court, further opined that decertification insured that any settlement would reflect the economic and legal considerations relevant to each case, rather than producing a cookie-cutter settlement figure driven not by the concerns of the individual parties but rather by their mutual concern over the potential impact of a decision by a single fact finder. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995).

The prospect of facing hundreds of individual lawsuits did not sit well with the Fractionators. They began negotiations with Tom Mull (who represented more than one-third of the plaintiffs in the filed cases), and his client Corey Dubin, president of the Committee of Ten Thousand, a grass roots organization the district court had recognized as spokesperson for the hemophiliac community.

One of the Fractionators, Baxter HealthCare Corporation, ultimately agreed in principal to pay $50,000 to each HIV infected hemophiliac, plus $17,500 in attorneys' fees,

a proposal reflected in a draft settlement agreement sent to Mull for his review. But, before that deal could be closed, the remaining Fractionators, Alpha Therapeutic Corporation, Armour Pharmaceuticals, and Bayer Corporation, asked to participate, and after a series of meetings offered to Mull the prospect of a "global" settlement deal. Mull and Dubin informed the Fractionators that a "global" package was not the correct approach to resolve these cases, but were informed that they should wait to see the number ultimately offered, because it would be one they "could not refuse." Mull and Dubin told the Fractionators the number it would have to be at least "six-figures," or it would never have any prospect of selling in the community. *See* generally Exhibit 1 to Mand. App. G and Exhibits 10 and 11 to Mand. App. K.

Immediately thereafter, in the *Wall Street Journal*, the Fractionators announced a non-negotiable two-part settlement of $100,000 "net of attorneys' fees" to members of the hemophilia community (or their heirs) infected with AIDS as a result of their use of factor concentrate, and a $40,000,000 Cost and Fee Fund to be divided among the lawyers representing the class, conditioned upon the Fractionators' determination, after the close of the opt-out period, that a sufficient number of the filed lawsuits opted-in to the settlement class to make the deal economically attractive. The offer was formally extended, not to Mull and Dubin, but to the Steering Committee in the MDL, with the invitation that it become class counsel. The Steering Committee accepted both offers.

One problem remained – certifying what had previously been held to be an illegal "litigation class" as a "settlement class." When presented with the parties' joint

request to make such a certification, Judge Grady expressed "skepticism" about the viability of such a class in light of *Wadleigh*. *See* Exhibit 5 to Mand. App. G, at 15. The Judge was told that a "class action" was needed so that the Court could control attorneys' fees, a contention he found acceptable. *Id.* Extensive discussion also ensued at that time as to whether a "settlement-only" class was permissible under Rule 23 in light of the Third Circuit ruling in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 625 (3rd Cir. 1996), *aff'd sub nom Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997). *Id.* at 26. Given the recent pronouncement of five judges of the Seventh Circuit that *Georgine's* castigation of "settlement only" classes enjoyed "general recognition," *Kamilewicz v. Bank of Boston*, 100 F.3d 1348, 1349 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1569 (1997) (Easterbrook, Posner, Manion, Rover and Wood JJ., dissenting) the proponents' concern was well-founded.

Apparently, all of the actors with an assigned role wanted the settlement class enough to ignore its illegality. The Fractionators joined forces with class counsel, and both encouraged the court to accept the settlement, without even discussing the risk of the scheme. So hurried was class counsel to push the deal, perhaps because of the Judge's admonition that they had best hurry in order to "slip [it] under the wire" before *Georgine* "pulled down the curtain" on their deal, *see* Exhibit 5 to Mand. App. G, at 26, that they filed a *Motion for Certification* the day *before* they even filed a complaint alleging the identical class claim disallowed in *In re Rhone Poulenc*. This nicety was presented to the Court after it noted the necessity of a vehicle through which its jurisdiction could be invoked. *See* R.App. 768, at 5-6. The selected class representative

was Susan Walker – a woman who admitted in open court that her claim was time-barred and that she could not expect relief from the Fractionators without a class settlement! *See* Attachment 17 to Mand. App. G, at 142.

The district court preliminarily certified the settlement-only class on August 14, 1996 – without conducting any Rule 23 inquiries as to fairness, numerosity, typicality or adequacy of representation – and without benefit of briefing or argument on any of these issues. It subsequently approved settlement of the "class claim" by Order entered on May 8, 1997, after the close of the opt-out period during which almost 6,000 persons, including the plaintiffs in approximately 1,000 filed lawsuits, had elected to participate. *See* Exhibit 2 to Mand. App. F. Three hundred of Mull & Mull's 450 clients, all with filed cases, had decided to "opt-in." In accordance with its obligations to these clients, Mull & Mull, on behalf of its clients, informed the district court that it did not oppose the settlement, although at least one formal opposition was filed which raised the specter of the impending *Georgine* affirmance. *See* R.App. 667. The Fractionators responded to these oppositions to the settlement with the contention that any attorney who represented any opt-ins had no standing to assert objections given that attorney's duty to the client. *See* R.App. 2, at 1.

As anticipated by the parties and the district court, this Court affirmed *Georgine* on June 25, 1997, *see AmChem Prod., Inc. v. Windsor, supra,* while appeals from the May 8 order were pending. The Fractionators dealt with the

obvious implication of *Amchem*, which was fully applicable to this case, *see Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993), by consenting to the relief demanded by the appellants, allowing them to exit the settlement class and become "opt-outs," without seeking or obtaining any judicial approval. This was done despite their prior representation on the record that a reopening of the opt-out period would jeopardize the settlement, *see* Mand. App. V at 112, and despite Judge Grady's previous characterization of such a suggestion by Mull & Mull co-counsel, Charles Kozak, as a "Rube Goldberg" invention. *Id.* at 153. The Fractionators' move was effective enough to bring dismissal of the appeals, thus precluding the Court of Appeals or this Court from directly considering the lethal effect *Amchem* had on the settlement. *See* Exhibit 16 to Mand. App. G.

Apparently unsure that the purchased "finality" of the May 8 order was not alone sufficient to protect their investment, the Fractionators concocted a "Rube Goldberg" invention of their own. They circulated a Release which they would demand that each claimant execute before concluding a settlement. This Release made it abundantly clear that, despite the purportedly "final" May 8 judgment, there was no settlement until each claimant executed the Release and submitted it to the Fractionators for approval. *See* App. 93 ("Whereas, in the absence of a fully executed Release from Releasors, Releasors will not receive payment under the Agreement or be entitled to any of the other benefits of the settlement . . . "); App. 97 ("receipt of such Settlement Consideration is conditioned upon" the receipt and approval of a signed release). The following paragraph completes the

distancing of the Release – and ultimately the claimants' settlement – from any "class settlement" made in the MDL:

> Releasors further represent and warrant that in agreeing to the terms of this Release, they have not relied on any finding of the fairness of the terms of the Agreement and/or this Release by any Court, including any determinations made by the Court in the *Walker v. Bayer Corp., et al.*, action in the United States District Court for the Northern District of Illinois or in the MDL proceedings pending in that same court. Rather, Releasors have reached their own decisions as to the fairness of the Agreement and this Release in consultation with counsel of their choice or have voluntarily elected not to consult with such counsel. Releasors also represent and warrant that they are not relying on the Court's order barring the filing or pursuit of individual claims and they would agree to the terms of the Release even if the Agreement were not part of a class settlement **but rather a completely private settlement.**

App. 101, at ¶14 (emphasis added). *Accord*, App. 93 (stating that the parties "now" desire settlement, indicating that no settlement had theretofore been confected, and App. 102, ¶18, where the Release states that it is the "entire agreement among the Parties hereto and that the terms of this Release are contractual, and not a mere recital.").

In recognition of the obvious importance of this newly-imposed settlement requirement, Tom Mull notified the Fractionators by letter of August 15, 1997 that no enforceable class action could be pending given *Amchem*.

He informed the Fractionators that their consistent efforts to proceed with any such settlement must reflect their intention to proceed with the 6,000 opt-in claimants on an individual settlement basis. His letter stated that the Rules of Professional Conduct required any communications with his clients to be channeled through his office. Finally, he indicated Mull & Mull's intention to assert its contractual rights to attorneys' fees against the Cost & Fee Fund and against the Fractionators personally where the Fund did not satisfy those rights. *See* Exhibit 7 to Mand. App. G.[1] Mull & Mull's counsel followed up this letter with one to each of the CEOs of the four Fractionators in which Mull & Mull's lien rights were reasserted. *See* Exhibit 13 to Mand. App. G. Mull & Mull also took steps to perfect its liens under Louisiana law.

On August 29, 1997, after Mull & Mull had notified them of the ramifications of *Amchem* and had advised them of the perfection of its lien rights, the Fractionators irrevocably committed themselves to completion of the settlement, without regard to any risk posed by *Amchem*. On that date, they deposited the settlement proceeds into

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[1] Contrary to the representation made by the Fractionators, Mull & Mull consistently asserted – in pleadings and in a hearing in open court on September 5, 1997 – that it never intended to assert a lien to be satisfied out of its clients' $100,000 settlements. Rather, Mull & Mull has always contended that the Fractionators are personally liable to the firm for one-third of the gross amount contemplated by a $100,000 net settlement – $50,000. Mull & Mull's "lien" creates a priority solely against the Cost and Fee Fund (or the vestiges of that fund) – which it contends represents an accounting of the fees that would otherwise have been paid to it – and against the Fractionators should that bank account not satisfy the fees.

an irrevocable Metropolitan Life trust account to be used to pay claimants. The Trust Agreement settling the Grantor Trust itself stated that the trust "is not being established pursuant to an order of, or being approved by, the United States, or any agency or instrumentality (including a court of law) of any of the foregoing and is not subject to the continuing jurisdiction of any such governmental authority." *See* Attachment to Mand. App. J. Article 10.11 of the Agreement provides that the situs of the trust is New Jersey. Consistent with its provision that the Trust was unrelated to the *Walker* settlement, Article 11.1 provides that the settlors and trustee agree that any actions in connection with the Trust Agreement will be brought or transferred to the United States District Court in New York, or if jurisdiction is lacking, to the New York Supreme Court.

On December 23, 1997, the Fractionators filed a *Motion to Adjudicate Liens*, asking that Judge Grady limit Mull & Mull's claims for fees to the Cost & Fee Fund – based on their asserted position that a valid class settlement still existed – and that the Court "warn" Mull & Mull that they would be sanctioned if they continued to press their contractual claims. *See* Mand. App. F. Mull & Mull opposed this request on the grounds that the May 8 Order was void, had been entered without jurisdictional authority and without any statutory basis, and was insufficient to support continuing jurisdiction over the claimants' attorneys. Mull & Mull additionally asserted that it was not bound by the May 8 class settlement Order

because the firm was not a party to that order.[2] It further contended that the issuance of the Releases and the execution of the Trust Agreement divorced the settlement of the claims from the May 8 class settlement. *See* Mand. App. "G". Therefore, the individual Releases signed by each of the claimants were subject to the contractual rights and lien obligations held by Mull & Mull as attorneys for the claimants.

One of those rights was the right to prosecute a tort and breach of contract action against the Fractionators. On January 6, 1998, Mull & Mull filed a lawsuit against the Fractionators in the 23rd Judicial District Court for the Parish of St. Tammany, Louisiana. That suit sought damages from the Fractionators for breaching their contract to pay the claimants' attorneys' fees, as well as for their interference with the contractual relations between the Mull firm and its clients. Mull & Mull did not seek to undermine the class settlement by this lawsuit nor to deprive any of the claimants of their $100,000 settlement proceeds. Indeed, Mull & Mull had previously filed a *Motion to Enforce* the settlement on behalf of those clients who had not been paid in accordance with the settlement agreement.

On February 18, 1998, Judge Grady issued an order granting the Fractionators' request for injunctive relief.

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[2] Judge Grady had expressed this view at a September 5, 1997 hearing, stating that the May 8 Order was not *res judicata* as to Mull & Mull because it was not a party to that Order. He did, however, state that the May 8 Order was "law of the case" and would govern his decision as to the allocation of fees. *See* Exhibit 12 to Appendix G, at 75.

That Order strongly rebuked Mull & Mull for asserting the voidness of the class action and held that Mull & Mull were equitably estopped from receiving any money outside the class action context. *See* App. 20. The district court made a cursory attempt to distinguish *Amchem* from *Wadleigh* by stating – months after the issuance of the Order – that he had previously convinced himself of the distinctions between the two. App. 18. It finally dismissed any objections based on distinctions between the Class Notice and the Release and held that said variations merely awarded the Fractionators the peace they had sought in reaching the agreement. App. 24.

Furthermore, the Court adjudicated several matters no one had ever brought before it at any time. Without notice or hearing, it enjoined Mull & Mull from asserting a right to attorneys' fees in any court in the country, immunizing the Fractionators both from contractual liability *and* from tort liability for abuse of process, intentional interference with contract, and conversion occasioned by their conduct during the putative class action. App. 27. It further abolished – again without notice or hearing – the contingency fee contracts Mull & Mull had with its clients, stating that the contracts "are of no force and effect" with regard to the division of the Cost & Fee Fund created under the "class settlement." App. 28. The district court thus created tort defenses for the Fractionators and vitiated contracts the validity of which it had never been asked to adjudicate.

The Seventh Circuit Court of Appeals affirmed the district court decision. The Court of Appeals' strongly-worded opinion recognized that it was "downright weird" that "*all* the members of the class should receive

the *identical* payment, even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly." App. 4. It thus reiterated its assertion – previously made in *In re Rhone-Poulenc* – that aggregation of the claims into a lump settlement did not produce an accurate measure of their relative individual value. The decision further underscored that "the settlement embodied in the consent decree may well be questionable, both in its form and in its terms." *Id.*

Yet the Court of Appeals affirmed the district court decision in all respects. The Court of Appeals first held that Mull & Mull was equitably estopped from challenging the settlement at this time, because it had not objected to the settlement prior to its consummation. *See* App. 7. This rationale ignored the fact that Mull & Mull's fiduciary obligation to those clients desiring to accept the settlement (more than 300 of the 450) precluded it from challenging the validity of the settlement until the Releases replaced the settlement as the proceed disbursement mechanism. The Court further indicated that Mull & Mull's current objections, if sustained, would require the return of all money paid out by the Fractionators to-date. *See* App. 5. Finally, the Court of Appeals held that the potential that Mull & Mull could enforce its contracts against the clients justified the issuance of an injunction against it, *see* App. 9, despite Mull & Mull's repeated statements on the record that this would never occur, and that the St. Tammany petition invoked state law that made the Fractionators, not Mull & Mull's clients, liable for attorneys' fees.

REASONS FOR GRANTING CERTIORARI

I. The Seventh Circuit's holding that the May 8 order is immune from an Article III challenge resolves without meaningful discussion a timely, important issue of constitutional law of first impression, in a manner impossible to reconcile with previous precedent, leaving federal courts impotent to vindicate frauds perpetrated upon them.

Without discussion, the Seventh Circuit found that the district court met the requirements of Article III and that "there is no question of the district court's having exceeded its jurisdiction in entering the decree." App. 4. The Court further found that a lack of subject matter jurisdiction could not be raised at the present time because of the supremacy of the doctrine of finality. App. 5 (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); *In re Edwards*, 962 F.2d 641 (7th Cir. 1992)).

These holdings deprive Article III of its jurisdictional centrality. Recently, this Court considered whether the first question that must be addressed in any case is whether Article III jurisdiction is present, and whether there is a reservoir of "hypothetical" jurisdiction for a court to adjudicate issues absent an Article III foundation. *See Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998). The Court apparently agreed with Justice Scalia – writing for a plurality – that even the so-called "hypothetical jurisdiction" doctrine would not tolerate instances where "immaterial" claims were asserted "solely for the purpose of obtaining jurisdiction." 118 S.Ct. at 1010. This is perfectly consistent with *Stoll*. There, this Court expressly stated that the doctrine of "finality" may prevent relitigation of the court's jurisdiction, except

where there is an allegation of fraud in obtaining the judgment. *See* 305 U.S. at 172.[3] Indeed, even the Seventh Circuit was forced to concede that an "egregious" want of jurisdiction will authorize collateral attack. App. 5.

However, the "egregious" want of jurisdiction, of the "fraud upon the court" kind, is precisely what is at issue in this case. Despite the Seventh Circuit's rumination that the allegations of "fraud" were "groundless" as far as it could tell, App. 3, the record makes it clear that the only purpose of the invocation of Rule 23 was to manufacture federal jurisdiction to preside over a national "in globo" settlement. The Fractionators seized that federal jurisdiction to give the federal court the power to abrogate the class members' contracts with their attorneys and divert those fees to the Steering Committee in exchange for its agreeing to serve as "class counsel." The Fractionators admitted attorneys' fees to be the purpose of the selection of the class action vehicle under direct questioning by the district court. *See* Exhibit 5 to Mand. App. G, at 15. It would have been more honest for them to have filed a petition asking for judicial approval of a national settlement, although they had been admonished by the court

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[3] Additionally, *Stoll v. Gottlieb* concerned whether the Full Faith and Credit clause was implicated by the relitigation of jurisdiction in one forum after it had been fully and fairly adjudicated in another. This Court held that "since the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties." *Durfee v. Duke*, 375 U.S. 106, 112 (1963). Here, the inquiry is whether in the absence of an Article III case or controversy, it can be said that the issue of jurisdiction was "fully and fairly adjudicated."

of the need for a petition that asserted a case and controversy in order to invoke its jurisdiction. The sham petition asserting a claim that was never intended to be litigated and which had already been determined to be illegal in *In re Rhone Poulenc*, is the very definition of a fraud upon the court.

But the fraud did not end there. After the class was certified, in order to insulate themselves from the very type of challenge that the Seventh Circuit has found impermissible, the Fractionators made every class member sign a Release as a precondition to confection of the settlement. The Release expressly stated that in concluding the compromise, the class member was not relying on the district court's approval of the settlement, was not influenced by the court's order barring the filing of suit, and consented to the settlement just as "if the Agreement were not part of a class settlement but rather a completely private settlement." App. 100. The settlement proceeds were deposited in a trust located in New York under a trust instrument that expressly disavowed that it was created to pay any class claims.

From start to finish, this "class action" was never anything more than a convenient fiction needed to give the district court jurisdiction to enforce a cumulated settlement of cases the aggregation of which the Fractionators had previously decried as impermissible and unnecessary when faced with the prospect of litigation. With no case and controversy in sight, however, the Fractionators were more than willing to not only consent to, but sponsor and pay for, a national "class action" because

it suited their purpose of obtaining protection from substantive state laws that served as an impediment to their desired "global" resolution.

Article III "limits the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *U.S. Parole Com'n v. Geraghty*, 445 U.S. 388, 396 (1980). "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (citing *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). The assertion of a fake claim for the purpose of securing federal jurisdiction, to secure relief not otherwise obtainable absent the exercise of federal power, is the very essence of the collusive feigned litigation that Article III was designed to prevent. This collusion is particularly egregious when both parties seek the same result – a decision that prejudices the rights of absent persons. *See, e.g., Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971); *Muskrat v. U.S.*, 219 U.S. 346, 359 (1911); *Cleveland v. Chamberlain*, 66 U.S. 419, 425 (1861). *See also Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 339 (1980). "[T]he federal courts lack authority to act in friendly or feigned proceedings." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 54 (1997) (citing *United States v. Johnson*, 319 U.S. 302, 304 (1943)) (absent "a genuine adversary issue between . . . parties," a federal court "may not safely proceed to judgment"). Any attempts to bring such a matter before the court represents an invitation to the court to abandon "the fundamental federal and tripartite character of our national

Government and . . . the role – restricted by its very responsibility – of the federal court." *Poe v. Ullman*, 367 U.S. 497, 503 (1961).

This Court should not tolerate what has transpired, for what is at issue here are not only the rights of private litigants, but the structure of the federal judiciary itself and its ability to safeguard its jurisdictional base. The thinly veiled "class action" at issue was an attempt to create a claims administration tribunal, with the power to enforce a global settlement of claims, having as its key feature the linking of claims too disparate to be cumulated for litigation purposes. The court's involvement was not to adjudicate any contested issue, but rather to lend its enforcement powers to facilitate achievement of the otherwise unobtainable goals of the PSC and the Fractionators with regard to the shifting of attorneys' fees from the class members' attorneys to class counsel. This is not an adjudicatory function. The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies." *Liverpool S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). *See also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982).

It is the court, and most particularly this Court, that retains the prerogative to determine whether the role it is being asked to play is envisioned by Article III. "While the parties may be permitted to waive nonjurisdictional defects, they may not by stipulation invoke the judicial power of the United States in litigation which does not

present an actual 'case or controversy,' " *Sosna v. Iowa*, 419 U.S. 393, 398 (1975) (citing *Richardson v. Ramirez*, 418 U.S. 24 (1974)). Notions of "consent" or "waiver" do not hamstring the court in considering whether the capacity being assigned to it by the litigants is proper. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

Nor does any lack of diligence on the part of the mover prevent a court from declaring that a fraud has been perpetrated upon it, for such "involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944). A collusive or feigned lawsuit, designed to secure an "adjudication" in the absence or any real case or controversy is such a fraud upon the court. Since it is not "in any real sense adversary," this type of suit "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated – a safeguard essential to the integrity of the judicial process. . . . " *U. S. Johnson, supra*, 319 U.S. at 305 (quoting *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)).

Another reason why the pretextual fraud which has been perpetrated upon the courts should not be tolerated is found in the "practical wisdom" that the Seventh Circuit lauds as supporting its decision – the pragmatism in pretermitting a serious Article III analysis because of the fact that the court was presented with a settlement *fait accompli*. Undisclosed by the Court of Appeals is the fact that the Fractionators voluntarily paid Mull & Mull's

clients, even after the district court had authorized a suspension of payment. This was done to forestall immediate review of the "class action," this time by mandamus petition contesting the suspension of payment. Thereafter, thousands of claimants were hurriedly paid as a result of the waiver of many of the administrative requirements that had previously been imposed by the Fractionators. There is no "practical wisdom" in rewarding the gamble taken by the Fractionators, unless there is practical wisdom in the aphorisms that one cannot fight City Hall or put a genie back in the bottle. What remains to be seen is whether there is "practical wisdom" in the Fractionators' hunch that skillful timing and the specter of a falling sky might in the end insulate their attempt to enlarge the jurisdiction of the federal courts in an unprecedented fashion.

The question of whether a court has the jurisdiction to enforce a class action claim that could not be litigated is not new to this Court. It pretermitted the issue in *Amchem*, in favor of a Rule 23 determination. *See* 117 S.Ct. at 2248. More recently, it has received oral argument in *Ortiz v. Fibreboard*, No. 97-1704, which also raises this issue. That case awaits disposition. Given that the decision in *Ortiz* may bear directly on the Article III challenge raised in this case, at a minimum, this Court should defer ruling on this case until after it renders its opinion in *Ortiz*. Thereafter, depending on the disposition, a remand to the Seventh Circuit for reconsideration of the question might be in order. However, if the Article III issue is pretermitted in *Ortiz* – as it was in *Amchem* – this case uniquely offers this Court a vehicle through which the obviously timely and ripe question can be resolved.

II. The Seventh Circuit's decision that *Amchem* could be avoided by manufactured finality is in direct conflict with *Amchem's* clear import, and relegates this Court's decision to the realm of procedural technicality, subject to avoidance by conduct of the parties such as waiver or stipulation. Writs should be granted to vindicate *Amchem* and to deter future attempts to circumvent it.

Due process requires that a class action judgment can only have binding effects on unnamed class members if they were adequately represented by persons whose interests were not in conflict with their own. *See Phillips Pet. Co., Inc. v. Shutts*, 472 U.S. 797 (1985). If adequate representation is prevented because of a conflict of interest, the judgment is not binding, regardless of its "finality." *See Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997); *In re Amer. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *Kamilewicz*, 92 F.3d at 511; *Smith v. Babcock*, 19 F.3d 257 (9th Cir. 1994).

The essential teaching of *Amchem* is that "settlement classes" are not immune from these rules. Indeed, because of the great potential for conflicts of interest which might be concealed by collusion, and the court's inability to depend upon the balance adversity generates to inform its decision, settlement classes must be more carefully scrutinized. *Amchem*, 117 S.Ct. at 2248. Faithful adherence to all safeguards is required, not as a mere procedural technicality, but because the court lacks any power to do otherwise, constrained as it is by Article III, the Rules Enabling Act, and by Rule 23 itself, which reflects the demands of due process. *See Amchem, supra*, 117 S.Ct. at 2244. *See generally* Carrington & Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The*

Invalidity of Proposed Rule 23(b)(4), 39 Ariz. L. Rev. 461 1997.

The settlement class at issue amply demonstrates the "practical wisdom" (to borrow the Seventh Circuit's phrase) of *Amchem*. This class action was sought ostensibly at least by Susan Walker, a woman who admitted in open court that her only claim against the Fractionators was time barred, and therefore worth no more than any gratuity the Fractionators might bestow. Yet, she sought to represent persons not only like herself, but also those with viable and significant claims for the devastation that AIDS has wrought upon them and their families, claims large enough to justify individualized resolution, as the Seventh Circuit held in *In re Rhone-Poulenc, supra*. The conflict of interest is more than obvious, as the Fractionators noted in opposing certification of the *Wadleigh* class. *See* App. 138, 155. That this class action was as infirm as the *Georgine* class at issue in *Amchem* is conclusively demonstrated by the Fractionators' admission to this Court in their *amicus* filing in *Amchem* that affirmance of the Third Circuit's *Georgine* decision would invalidate the then pending *Walker* class. *See* Frac. Amicus in Dk. No. 96-207, at 2. Susan Walker could not possibly represent the 10,000 hemophiliacs she claimed to, a community whose ranks included future claimants whose claims were not yet ripe, those who unquestionably had timely filed suit, and some like the Louisiana plaintiffs who had the benefit of strict products liability laws supporting their claims.

Class counsels' conflict of interests were even worse. In a public statement issued in response to the settlement offer, Class Counsel eloquently explained: "the actual

written offer makes clear that among the thousands of victims who could participate, not more than 100 can decline to go along with the terms and conditions of the defendants' proposal. Otherwise, once again, the defendants can pull the plug." Mand. App. Attachment 6 to Exhibit K. Thus, Class Counsel was obliged, in order to represent its one client Susan Walker, to convince as many people as possible to accept this settlement, because every claimant that it advised to opt-out might be the one who would break the camel's back and spoil the deal for Walker.

Of course, spoiling the deal would not have only injured Walker – it would have devastated Class Counsel as well. After having lost the *Wadleigh* class action, the Steering Committee had no mechanism to generate a "common fund" fee pot from which to feed.[4] The promise of a $40,000,000 Cost and Fee Fund offered it considerably more than the assessments that might be levied against successful MDL cases. This is not to say that

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[4] Tom Mull was a member of the Steering Committee until he was removed by the court as a result of disagreements over litigation strategy and his attempt to convince the court to allow opt-ins to the Walker settlement an opportunity to change their minds due to allegations that the Steering Committee had failed to develop and promote the most powerful theory of liability he believes exists. The court disagreed with him, and removed him when it certified the class. Previously, he appeared as "of counsel" along with every other Steering Committee member on the *Walker* petition. He was not listed on any of the "settlement class" pleadings, such as the motion for certification, settlement approval, request for notice, *etc.*, all filed as part of the "one stop shopping" package by Class Counsel, which was limited to only two of the Steering Committee's members.

unbridled self-interest consciously motivated the Steering Committee in discharging its other role as Class Counsel. But, a carrot such as this (the promise of fees not otherwise obtainable) has been recognized to create such a potential conflict as to preclude constitutionally-acceptable representation. *See Epstein v. MCA, Inc., supra,* 126 F.3d at 1248-55.

In short, it is settlement classes such as this one that are precisely the object of *Amchem* 's exquisite wisdom. The Seventh Circuit was certainly correct in its assessment of this class settlement as "downright weird."

When a court exceeds its authority, and exercises a power it does not enjoy, the resulting judgment is void. This was the rule in the Seventh Circuit prior the instant decision, *see United States v. Indoor Cultivation Equipment,* 55 F.3d 1311, 1316-17 (7th Cir. 1995); *DDI Seamless Cyl. v. Gen. Fire Ext. Co.,* 14 F.3d 1163, 1166 (7th Cir. 1994). While an error in interpreting a statutory grant of jurisdiction may not render a judgment void, a judgment issued in the absence of any jurisdiction whatsoever, such as when a court enters an order completely beyond the scope of its authority, is void. *See, e.g., Crivello v. Michel,* 134 F.3d 831 (7th Cir. 1998), discussing Seventh Circuit and other law; *Jones v. Giles,* 741 F.2d 245, 247 (9th Cir. 1984) ("Absence of subject matter jurisdiction may render a judgment void where a court wrongfully extends its jurisdiction beyond the scope of its authority.").

This is not the case to retreat from these principles, because *Amchem* reinvigorates them in the "settlement class" context. The Seventh Circuit's cavalier dismissal of the issue of nullity relegates the *Amchem* principle to a

procedural hyper-technicality, instead of paying homage to its substantive significance. From *Hansberry v. Lee*, 311 U.S. 32 (1940) forward, it has been recognized that certification of a class action triggers serious constitutional concerns. *Amchem* teaches that meticulous adherence to Rule 23 is the only method by which these concerns can be satisfied, not only in the litigation class, but especially with regard to a "settlement only" class. That a settlement class was "slipped in under the wire" does not render the usurpation of power embodied in its certification in the face of a final determination that Rule 23 could not be invoked any less serious.

The Seventh Circuit's contrary conclusion paves the way for further expansions of judicial authority, justified by the "practical wisdom" of the doctrine of finality.[5] No case before could be found where parties have been allowed to avoid a direct Supreme Court pronouncement handed down while a case was on appeal by turning back the clock through a negotiated dismissal of the appeal in order to avoid application of this Court's edict. Indeed, it appears as if no one has even tried such a spurious gambit before, at least in the context of a decision by this Court which limits the very power and authority of the

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[5] Evasions of *Amchem*'s holding in the future could simply follow the model presented by the instant case, in the hope that there will be no timely objections lodged until "final" judgment, after which class counsel and the defendants will be home free. This is not an unrealistic expectation, given that in an "opt-out" class those who disagree with the class will simply opt-out, and thus have no standing to object, and if there are opt-ins who appeal, they can simply be allowed to exit the class, as occurred here.

court to act in order to avoid constitutional crisis. This is probably because such manipulation obviously constitutes an attempt to expand judicial authority and jurisdiction by stipulation and agreement between parties, which has never before been tolerated. It should not be tolerated now, not only for deterrent purposes, but also because to do so guts *Amchem* of its very soul.

Rule 10.1 recognizes that this Court may be called upon on occasion to grant certiorari, and review a decision, for no other reason than that the lower court has tolerated a gross departure from the accepted rules or so far sanctioned an impermissible course as to warrant exercise of its powers of judicial supervision. As Justice Stevens has noted, "as the Court of last resort in the federal system we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting). *See, e.g., McNabb v. United States*, 318 U.S. 332 (1943). Exercise of such supervisory jurisdiction is particularly appropriate in this case, where to deny it would allow the offender to retain the benefit of the gross departure from accepted procedures, rewarding a patent wrong and encouraging further misconduct.

III. The Seventh Circuit decision holding that attorneys are personally bound as a result of their participation in a representative capacity is in direct conflict with this Court's holdings abolishing the duty to intervene, and creates dangerous precedent that should be immediately reversed.

The lower courts held that Mull & Mull – by acting as attorneys for certain putative class members – could

become bound by the resultant class settlement order. Yet the courts did not employ the traditional principles of *res judicata* and issue preclusion in determining the effect of the judgment on the Mull & Mull attorneys. *See* Exhibit 12 to Appendix G, at 75 (district court recognizing that the May 8 Order was not *res judicata* as to Mull & Mull because they were not parties to the litigation). Instead, they raised the concepts of equitable estoppel and waiver to a form of *res judicata*, holding that "having participated in the settlement proceeding and having failed to make timely objection to it, they are barred by the principles of waiver and equitable estoppel from challenging the settlement after it has become final." App. 7.

This holding creates a serious potential for grave harm, because it rewards an adversary's intentional creation of a rift in the attorney/client relationship. To understand this, one need look no further than the plain import of the Seventh Circuit's decision. On the one hand, Mull & Mull is severely castigated for jeopardizing its clients' interests, and on the other it is denied relief because it did not assert the claim that allegedly threatens its clients sooner than it did.

No conflict of interest existed before the defendants sought to interdict state law which prevented the Fractionators from seeking to lessen their liability for attorneys' fees in a "net of fees offer" by asking the *client* to agree to a cap on fees. Compare *Evans v. Jeff*, 475 U.S. 717 (1986) (where this Court approved of such an arrangement in a statutory fee shifting case, because there, as opposed to a contingency fee case, the fee belongs to the client, not the lawyer and a fee waiver was consistent with congressional intent). Thereafter, when the clients'

settlement was hinged upon the Cost and Fee Fund feature of the settlement, no attorney could object to the Cost and Fee Fund feature, or oppose the settlement on his or her own behalf, if the Settlement Fund portion of the settlement was in the client's best interest or desired by the client. At least one attorney who tried to do so prior to settlement approval was criticized by the Fractionators as acting adversely to his client's interests. *See* R.A. 2, at 1.

Attorneys should not be punished, as have Mull & Mull, for trying to negotiate such a mine field. They should be allowed to zealously represent their clients in their capacity as attorney, with the knowledge that at some later date, when their clients' interests are no longer at issue, they can then do what is required to protect themselves.

The Court of Appeal's contrary rule ignores the well established rule that no one is required to defend, or appear, in litigation unless named as a party – there is no estoppel unless there is a duty to appear. *See Martin v. Wilks*, 490 U.S. 755, 761 (1989). *See also Richards v. Jefferson City*, 517 U.S. 793, 797, 116 S.Ct. 1761, 1765 (1996). Where parties settle their disputes extrajudicially, they cannot deprive non-parties of their rights, or impose on them "duties or obligations," without joining those parties and giving them the opportunity to be heard in a meaningful manner. *Local No. 93 v. Cleveland*, 478 U.S. 501, 529 (1986). Those non-parties have no duty to intervene in the litigation and can rest assured by non-intervention that only those judgments in which their rights are adequately represented will in fact bind them. *See Chase Nat. Bank v. Norwalk*, 291 U.S. 431 (1934).

These rules are not bent when one party appears in a case in a purely representative capacity. A judgment cannot have effect against a non-party, "even when the party in question is present in the case in some other capacity." *Rossi v. Boston Gas Co.*, 833 F. Supp. 62, 68 (D.C. Mass. 1993) (citing *Bender v. Williams Port Area School District*, 475 U.S. 534 (1985)). "*Res judicata* does not apply when the parties appear in one action in a representative capacity and in a subsequent action in an individual capacity." *Tank v. Southern Methodist Univ.*, 116 F.3d 775, 776 (5th Cir. 1997), quoting *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir. 1990). *See also*, Restatement (Second) of Judgments § 36(2) (1982) ("A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of *res judicata* in a subsequent action in which he appears in another capacity."). Thus, adjudication of a clients' rights is not binding on an attorney merely because he or she is counsel of record. *See Fleming v. Lake Delton Dev. Corp.*, 241 F.2d 865, 866 (7th Cir. 1957), *cert. denied*, 355 U.S. 821 (1957). *See also Britton v. Seale*, 81 F.3d 602, 606 (5th Cir. 1996); *U.S. v. Schwimmer*, 968 F.3d 1570, 1578 (2nd Cir. 1992). The imposition of a duty upon attorneys appearing in a representative capacity to simultaneously represent their own interest in order to prevent estoppel by judgment announces a dangerous rule warranting this Court's immediate consideration.

CONCLUSION

For the foregoing reasons, Mull & Mull respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit and reverse that court's decision to vitiate Mull & Mull's contingency fee contracts and liens and to enjoin Mull & Mull from prosecuting its state court tort and breach of contract suit against the Fractionators.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

Nos. 98-1438 and 98-1770

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION,

APPEALS OF ROY G. SPECE, JR., ROSE MARIE IBANEZ, and MULL & MULL.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 5024 – **John F. Grady**, *Judge*.

No. 98-1629

IN RE MULL & MULL.

Petition for a Writ of Mandamus.
No. 94 C 5324 – **John F. Grady**, *Judge*.

SUBMITTED SEPTEMBER 8, 1998 – DECIDED OCTOBER 19, 1998

Before POSNER, *Chief Judge*, and BAUER and ROVNER, *Circuit Judges*.

POSNER, *Chief Judge*. Five years ago, a nationwide class action was filed on behalf of hemophiliacs who had been infected in the early 1980s with AIDS virus (HIV) contained in blood solids manufactured and sold by the

defendant drug companies for the treatment of hemophilia. Blood solids are manufactured from blood sold or donated to blood banks and the defendants had failed either to screen the blood for HIV or to process the blood in a way that would kill any HIV in it. The class claimed that the defendants were negligent in not taking these precautions. After we granted mandamus, on grounds unnecessary to recite here, to decertify the class, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), the parties' lawyers continued to negotiate over a mass settlement of the estimated 6,000 suits that either had been or were expected to be filed by or on behalf of infected hemophiliacs. The negotiations resulted in the certification of the class, though this time for settlement only, and the entry, last year, of a consent decree. The decree provided that each member of the class who was willing to release the defendants from liability would receive $100,000 net of attorneys' fees and that the defendants would establish a $40 million fund out of which attorneys' fees would be paid in amounts to be determined by the judge. The decree extinguished the rights of the lawyers for those class members who signed a release to enforce their contingent-fee contracts with such members, because it provided that "no attorney's fee shall be payable by any class members other than those fees approved by the Court to be payable from the [$40 million] fund." Contingent-fee contracts generally entitle the lawyer to 33 to 40 percent of any judgment or settlement. In the case of a settlement that yielded a net of $600 million to the claimants, this would mean lawyers' fees of $300 to $400 million (since a gross settlement of $900 million would yield the claimants $600 million if their

lawyers were entitled to 33 percent), not $40 million, actually less than $40 million since the fund was to be the exclusive source of court costs as well as attorneys' fees.

The few appeals from the consent decree were voluntarily dismissed. The process of obtaining releases from members of the class began and is now substantially completed, with some 5,200 class members having executed releases and been paid $100,000 each. Several hundred of these class members are represented by the lawyers who have filed, on their own behalf and not on behalf of their clients, the two appeals and the petition for mandamus that are before us for decision today.

These lawyers accuse the lawyers for the class and for the defendants – groundlessly, as far as we can tell – of defamation, bait-and-switch tactics, hoodwinking, infamy, dishonesty, illegality, intimidation, extortion, hypocrisy, hysteria, and Marxism. Yet they did not oppose the settlement. They objected initially to the amount of the settlement but their objection was rejected after a hearing and they did not renew their opposition or appeal from the consent decree, of which their clients have, as we have noted, taken full advantage. And at no time did they object to the attorney's fee provision of the settlement. Only after the time for appealing from the consent decree had run did these lawyers advise the district court of their view that the consent decree was invalid insofar as it limited their fees and barred them from trying to enforce their contingent-fee contracts with their clients. They also instituted collateral attacks on the settlement in the state courts of Louisiana, which resulted in a temporary cessation of payments by the defendants to the clients of these lawyers. The district judge

responded to these shenanigans by enjoining the lawyers from attempting to enforce their contingent-fee contracts or liens based upon them, and he declared the contracts void to the extent that they are inconsistent with the consent decree. The lawyers have challenged his actions both by appealing and by seeking mandamus.

The injunction is appealable without regard to finality, 28 U.S.C. § 1292(a)(1), and if the appellants are correct that the consent decree is "void," then the injunction, being ancillary to it, would fall with it. If the consent decree were truly void, the injunction based on it would presumably also be void, and so unappealable because a void order imposes no obligations; but in that event mandamus would lie to vacate the injunction. *DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163, 1166 (7th Cir. 1994). The settlement embodied in the consent decree may well be questionable, both in its form (cf. *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), disapproving "settlement classes," albeit in different circumstances from those of this case) and in its terms. That *all* the members of the class should receive the *identical* payment, even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly, is downright weird. But there is no question of the district court's having exceeded its jurisdiction in entering the decree. All the requirements of Article III were satisfied.

Even if they had not been, it is unlikely that the settlement could be set aside at this late date. The appellants argue that "when subject matter jurisdiction is lacking or due process has been denied, the final judgment is

void, and its nullity must be recognized in any collateral proceeding in which it is asserted as binding." This is an overstatement. The principle that jurisdictional defects may be noticed at any time is limited, as we explained in *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992), by the equally important principle that litigation must have an end. After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938); *In re Edwards*, *supra*, 962 F.2d at 644; *Restatement (Second) of Judgments* § 12 (1982). (On the significance of participation, see, e.g., *Williams v. General Electric Capital Auto Lease, Inc.*, No. 97-1321, 1998 WL ___, at *___-___ (7th Cir. Oct. 2, 1998).)

The practical wisdom of this rule is shown by the present case. The defendants have paid out more than $500 million. Are they now to go around to all 5,200 class members whom they have paid and ask for their $100,000 back so that this litigation can return to its starting point? Not that the appellants are asking for this. They just want more fees. But the $40 million cap on attorneys' fees was an important part of the deal from the defendants' standpoint, given their commitment to pay each class member a net of $100,000, so that the attorneys' fees would have to come out of the defendants' pockets. If the cap is to be lifted the entire settlement must be rescinded and the parties returned to square one by the return of the moneys paid out under it. This would also have to happen if the appellants decided to seek additional fees not from the defendants but from their own clients; the

defendants wouldn't care, but of course the clients would be entitled to rescind their releases, which had been premised on the receipt of $100,000 net.

We are mindful that Fed. R. Civ. P. 60(b)(4) authorizes, and the cases interpreting it require, "void" judgments to be set aside at any time. *United States v. Indoor Cultivation Equipment*, 55 F.3d 1311, 1317 (7th Cir. 1995); *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 400 (7th Cir. 1986). But set aside *by the district court*; it is there that the motion must be filed; and the appellants have never filed such a motion. But we don't want to give them false hopes. They will gain nothing by trying to file such a motion in the future. For "void" is just the name we give to those judgments that can be set aside without regard to the usual limitations on challenging judgments after they have become final by exhaustion of appellate remedies; and as the authorities cited in the preceding paragraph make clear, a judgment is not to be pronounced void merely because the court that entered it may not have had jurisdiction. And, needless to say, substituting for a 60(b)(4) motion in the district court a petition for a writ of mandamus in the court of appeals (cf. *Cohen v. Illinois Institute of Technology*, 581 F.2d 658, 662 (7th Cir. 1978); *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 71 n. 3 (2d Cir. 1973) (Friendly, J.)) shouldn't enlarge the meaning of "void." Indeed, given the rule, the only occasion for using mandamus – a last resort, a safety hatch where no other vehicle for obtaining judicial relief is available, e.g., *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam) – to get rid of void judgments would be where Rule 60(b)(4) relief had been sought in the district court and denied there, and the order denying it was

unappealable, as in *Moses v. Banco Mortgage Co.*, 778 F.2d 267, 275 (5th Cir. 1985). That is not this case.

Rule 60(b)(3) allows judgments to be set aside on the ground of fraud, and the appellants argue that the settlement was procured by fraud. But this rule (unlike 60(b)(4)) has a time limit of one year, which the appellants have now exceeded, for as we have said they never filed a Rule 60(b) motion, and so it is now too late for them to file such a motion bottomed on subsection (3). Anyway their allegations of fraud are fantastic and even preposterous. The most fantastic is the claim by one of them that he was on the verge of negotiating a $1.8 billion settlement with the defendants when the class lawyers by a dastardly maneuver preempted him by agreeing to accept a measly $600 million. If this were true, which we do not for a moment believe, the lawyer would have been ethically obligated, as well as impelled by powerful motives of self-interest, to bring this to the attention of the district judge in the hearing that the judge conducted (and the lawyer attended) on the fairness of the proposed settlement.

Even if *someone* might have been or might still be able to challenge the settlement, presumably someone who had not had notice of or a fair opportunity to participate in the proceeding yet had been adversely affected by it, it is not these lawyers. Having participated in the settlement proceeding and having failed to make timely objection to it, they are barred by the principles of waiver and equitable estoppel from challenging the settlement after it has become final and the defendants have paid and the class members have received hundreds of millions of

dollars. *Skelton v. General Motors Corp.*, 860 F.2d 250, 259 (7th Cir. 1988).

Since the settlement stands, the judge's power to issue the injunction (and related declaratory relief) against these lawyers' enforcing the contingent-fee contracts or liens based upon them was a proper exercise of the court's jurisdiction under 28 U.S.C. § 1651 ("all writs") to prevent interference with its orders. E.g., *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977); *Williams v. General Electric Capital Auto Lease, Inc.*, *supra*, at *___; *United States v. Silva*, 140 F.3d 1098, 1103 (7th Cir. 1998); *In re VMS Litigation*, 103 F.3d 1317, 1324 (7th Cir. 1996); *In re Agent Orange Product Liability Litigation*, 996 F.2d 1425, 1431 (2d Cir. 1993). The settlement agreement guaranteed all acceding class members $100,000 free of attorneys' fees. The appellant lawyers are now claiming the right to sue their clients for a third or more (whatever the contingent-fee contract provides) of the $100,000. This claim is not only a dagger aimed at the heart of the settlement and therefore properly enjoinable; it raises serious ethical concerns. Having induced their clients to sign releases under the impression that the consideration for the release was $100,000 net, the lawyers now assert a right to turn on the clients and take for their own benefit a substantial fraction of that purportedly net recovery. It is true that they *don't* want to sue their clients, or even to undo the settlement; they would be quite content to take the $15 million or so that they think their contingent-fee contracts entitle them to out of the $40 million costs and attorneys' fees fund, and indeed would greatly prefer this route to having to sue hundreds of individuals. But if they did get what they are seeking

out of the fund, the settlement would come apart, to the detriment of their clients, because there wouldn't be enough money for the other lawyers. In any event, the appellants' insistence that notwithstanding the consent decree the contingent-fee contracts remain valid and enforceable – which means enforceable against the clients who signed them – created a sufficient danger to the clients (as well as causing the delay in payment to them that we mentioned earlier) to warrant the district court's enjoining these lawyers from trying to enforce the contracts.

The order of the district court is

AFFIRMED.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

No: 96cv5024 Walker v. Bayer Corp, et al

2/18/98	80	MINUTE ORDER of 2/18/98 by Hon. John F. Grady: (1) The motion of Mull-Kozak to enforce settlement is denied; [55-1] (2) the motion of Spece-Ibanez for an order rescinding release provisions exonerating government bodies and for other relief, including discovery on the issue of fraud is denied; [52-1] (3) the motion of defendants for adjudication of liens is granted; and (4) the motion of defendants for enforcement of the Order of 05/08/97 is granted. (See attached memorandum opinion for further provisions) Enter memorandum opinion. Mailed notice (hp) [Entry date 02/25/98]

[96-5024.981] February 18, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE	)	MDL-986
FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	)	
SUSAN WALKER, Administratrix of the Estate of Steven Walker, Deceased,	)	THIS DOCUMENT RELATES TO:
Plaintiff,	)	
v.	)	
BAYER CORPORATION, et al.,	)	No. 96 C 5024
Defendants.	)	

ORDER CONCERNING CERTAIN CLAIMS FOR ATTORNEYS' FEES

On May 8, 1997, this court entered an order approving the class settlement in this case. The basic elements of the settlement are that each claimant group will receive a payment of $100,000, net of attorneys' fees. The settlement provides for a $40 million cost and fee fund to be contributed by the defendants, which will be the exclusive source of any payments to class members' attorneys for their fees and costs.

The court had held day-long fairness hearings on the proposed settlement in November of 1996 and April of 1997. At these hearings, anyone wishing to be heard in favor of or in opposition to the settlement was given an

opportunity to speak. A number of attorneys for class members were present at these hearings. They included Charles R. Kozak, Thomas W. Mull and Roy G. Spece, Jr., who represent several hundred class members. At the November hearing, none of these attorneys expressed any objection to the settlement. Later, Messrs. Kozak and Mull wrote to the court expressing concern over the amount of the settlement and accusing class counsel of having overlooked liability theories which, if asserted, would have resulted in a larger settlement offer from the defendants. This correspondence was the occasion for the additional fairness hearing in April of 1997. At that time, the court heard fully from Mr. Kozak and found that there was no merit to his and Mr. Mull's assertion that class counsel had failed to take adequate account of every theory that would lend strength to plaintiffs' negotiating position. After further consideration, the court entered the Order of May 8th approving the settlement.

The importance of the foregoing history for present purposes is that neither Mr. Mull, Mr. Kozak nor Mr. Spece, nor attorney Rose Ibanez, (who, in association with Mr. Spece, represents a number of class members) made any objection to the *attorneys fee* aspect of the settlement. The only objection made by any of them to any part of the settlement was the objection by Messrs. Mull and Kozak that the $100,000 payment to each class member was too small, due to class counsels' alleged failure to emphasize the alternate liability theories favored by Messrs. Mull and Kozak. Notwithstanding these reservations about the amount of the settlement offer, Messrs. Mull and Kozak made it clear that they

were *not* asking the court to reject the settlement (a position the court found somewhat difficult to understand), but were instead urging the court to approve the settlement for class members who desired to accept it. Mr. Spece also urged that the settlement be approved.

The Order of May 8, 1997 stated that it was final and appealable and the court's intention to make it final and appealable was understood by all the attorneys who had participated in the settlement, including Messrs. Mull, Kozak and Spece and Ms. Ibanez. Although several non-party class members did file appeals, the grounds asserted did not challenge the attorneys fee provision of the settlement and those appeals were eventually dismissed by agreement. No attorney filed any appeal challenging the limitation of attorneys' fees to amounts determined by the court to be payable from the $40 million fund.

The Order of May 8 directed the parties to proceed with implementation of the settlement, which has been occurring since that time. The process has turned out to be considerably more complicated and time-consuming than anyone anticipated. The settlement agreement recognized that the only way class members could realize a net payment of $100,000 was through waiver of subrogation and reimbursement liens that might be asserted against the settlement proceeds by the federal government, all 50 state governments, and a number of insurance companies based upon the medical benefits they had provided to class members. In many instances, the amounts of these liens would have wiped out all or a substantial part of a class member's settlement with the defendants. In recognition of this problem, the settlement agreement provided

that it was conditioned upon the resolution of all subrogation claims to the parties' "mutual satisfaction." The defendants carried on extensive negotiations with the various lien claimants and kept the court advised of their progress. As a result of these efforts, the federal government, all states, and the major insurance companies have provided waivers of any claims for reimbursement. This aspect of the settlement, therefore, has been successfully completed. The defendants had to pay the lien claimants for these waivers ($30 million to the federal government), which has added to the cost of the settlement from the defendants' standpoint.

Another implementation problem has been the matter of obtaining the necessary releases from persons who might have claims against the defendants arising out of the subject matter of this litigation. Signatures of class members and their spouses are obvious enough, but the variations in state law as to who might be able to sue, and when, have caused misunderstandings and delays that were not foreseen at the time the court approved the settlement. The agreement provides that necessary releases will be obtained, but does not set forth specifics. Questions have arisen concerning the need in some cases for the signatures of children, parents, siblings and former spouses. The court has received a large amount of correspondence from opt-in class members expressing disappointment, even bitterness over what they regard as unreasonable requests by the defendants for unnecessary signatures. What has become clear, however, is that signatures of some rather surprising people are sometimes required in order to protect the defendants from the possibility of future litigation in regard to a class member,

even when that class member signs a release. For example, if the class member dies of his HIV infection after signing the release and receiving the settlement money, the laws of some states would permit a wrongful death action to be brought by the next of kin of the class member, despite his having given a release during his lifetime. The theory is that upon his death a new cause of action arises which the decedent would not have had the power to release during his lifetime.

The defendants have found it necessary to retain counsel to advise them about the requirements for valid and effective releases in each of the 50 states, and they have adopted a policy of waiving signatures determined not to be necessary in light of this advice. Class counsel is involved in attempting to obtain waivers where appropriate, and counsel has not complained to the court that the defendants are insisting upon signatures or procedures (e.g., state court approval in regard to minors) that are unnecessary.

One of the things the federal government insisted upon in return for the waiver of its reimbursement claims is that the releases obtained from the class members include the federal government as a releasee. The government was unwilling to release its claim for reimbursement if it might later be sued by a class member.[1]

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[1] The releases also relinquish claims against state governments which waive their right to reimbursement.

I. THE ASSERTION OF CLAIMS FOR CONTINGENT FEES BY ATTORNEYS MULL, KOZAK, SPECE AND IBANEZ[2]

The occasion for this opinion is that Messrs. Mull, Kozak and Spece and Ms. Ibanez now take the position that they are entitled to collect the one-third contingent fees provided for in their retainer agreements with the opt-in class members they represent.[3] These attorneys have notified the defendants that they are asserting "liens" for their contingent fees against the $40 million fund, and, to the extent payments from that the fund might not satisfy their claims, against the defendants personally. In addition, they have indicated an intention to file tort claims against the defendants in other courts, asserting fraud and interference with contractual relations and seeking compensatory and punitive damages. The theoretical basis for the attorneys' position is essentially three-fold.

First, the attorneys assert that this court's Order of May 8, 1997 approving the class settlement is "void" by

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[2] Attorneys Mull and Kozak take a common position on the issues addressed in this opinion and will therefore sometimes be referred to as Mull-Kozak. Attorneys Spece and Ibanez also present a common argument, similar but not necessarily identical to that of Mull-Kozak, and they will sometimes be referred to as Spece-Ibanez. The four attorneys will also sometimes be referred to collectively simply as "the attorneys."

[3] Although this is a Rule 23 class and no "opt-in" is actually involved, there have been various problems in regard to opt-outs, so that the court and the parties have adopted the convention of referring to "opt-ins" and "opt-outs."

reason of the Supreme Court's decision in *Amchem Prods., Inc. v. Windsor*, 117 S.Ct. 2231 (1997).

The second basis for the attorneys' position is that, not being parties to the case or the settlement agreement, they are not "bound" by the May 8 Order and are free to assert their contractual rights.

Finally, the attorneys argue that whatever the status of the May 8 Order and the class settlement, the releases submitted by the defendants to the class members depart so materially from the terms of the settlement that they constitute "new offers" to each of the 6,000 opt-ins, which render enforceable the contingent fee contracts of the attorneys.

All of the attorneys argue that the defendants had a fraudulent intent in entering into the settlement in that their true purpose was to interfere with the attorneys' contingent fee contracts.

Three motions are before the court for decision. Mull-Kozak have filed a "Motion to Enforce Settlement," which seeks to compel the defendants to disburse the $100,000 settlement payments to each of their opt-in clients without further delay and without regard to the fact that Mull-Kozak are claiming the right to fees and damages in excess of any amounts they may be found entitled to receive from the fee fund established pursuant to the settlement. Spece-Ibanez have filed a motion seeking similar relief and, in addition, an order invalidating the portion of the release which releases the federal government. They also ask leave to conduct discovery in regard to the alleged fraud on the part of the defendants. For their part, the defendants have filed a "Motion for

Enforcement of Order" and a "Motion to Adjudicate Liens."

DISCUSSION

I. WHETHER THE MAY 8, 1997 ORDER APPROVING THE CLASS SETTLEMENT IS "VOID"

Assuming *arguendo* that the decision of the Supreme Court in the *Amchem* case would have precluded the class settlement in this case, the fact is that the order approving the settlement was entered on May 8, 1997, and *Amchem* was not decided until June 25, 1997, six weeks later. The attorneys have offered no persuasive argument for giving *Amchem* retrospective application, but argue instead that the holding of *Amchem* means that this court lacked subject matter jurisdiction to approve the settlement. But, as defendants point out, the attorneys are confusing subject matter jurisdiction with the different question of whether the settlement class met the requirements of Rule 23. Any question on the latter point does not go to the court's subject matter jurisdiction but simply to the question of whether, under the law as it existed prior to the *Amchem* decision, the requirements of Rule 23 were met. That was something that could have been taken up on appeal but was not because these attorneys elected not to do so. Because the May 8, 1997 Order was not an appeal by a party to the case at the time of the Supreme Court's decision in *Amchem*, that decision does not affect the order. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993).

Moreover, before this court decided to approve the settlement, it concluded that the situation addressed by

the Third Circuit in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3rd Cir. 1996), the case that became *Amchem* in the Supreme Court, was factually distinguishable in critical ways from this case. We are of that same view today. The considerations which prompted the Supreme Court to set aside the settlement in *Amchem* – primarily the lack of any genuine adversarial process and the lack of any guarantee of fair representation of absent class members – are simply not present here. In the event this settlement had been reviewed on appeal, there is substantial basis for believing it would have been approved. Certainly there is no basis for giving Mull-Kozak and Spece-Ibanez the benefit of a presumption that it would have been set aside.

As far as this court is concerned, the May 8, 1997 Order remains in full force and effect and is not subject to challenge on the basis of *Amchem* or any other authority.

II. WHETHER THE ATTORNEYS ARE BOUND BY THE MAY 8, 1997 ORDER INSOFAR AS THEIR FEES ARE CONCERNED

While arguing that they are not "bound" by the settlement agreement or the Order of May 8 because they were not "parties" to either, the attorneys have no hesitation about seeking to benefit from the settlement. They have all sought and received substantial cost reimbursements from the cost and fee fund. They also seek to collect their contingent fees from the fund.

While it is technically true that the attorneys are not "parties" to the settlement, it does not follow that they are not bound by its terms. On the contrary, as the court

held in *Skelton v. General Motors Corp.*, 860 F.2d 250, 259-260 (7th Cir. 1988), *cert. denied* 493 U.S. 810 (1989), the conduct of the attorneys "binds them to the agreement." *Id.* at 259. They participated in the settlement, urged the court to approve it and gave no indication that they were intending to challenge the provision concerning attorneys' fees. They have accepted benefits under the settlement. Under the analysis of *Skelton*, which also involved a dispute over attorneys' fees in a class settlement with fee and cost fund, this conduct on the part of the attorneys has bound them to the terms of the agreement, including the terms they dislike.

It requires little reflection to understand the need for such a rule if class action settlements are to be enforceable at all. It is doubtful that the court has authority to require the individual attorneys for all class members to sign the settlement agreement, since it is true that the attorneys are not parties. Moreover, the distrust implied in such a demand would be demeaning to both the court and the bar. But even though the attorneys have not signed the agreement, it is surely reasonable for the court to regard them as bound by any provisions that may affect them, such as limitations on their fees, in the absence of any objection by them, unless, of course, there has for some reason been an insufficient opportunity to object. Here, there was no lack of opportunity – there was every opportunity, and for a long period of time. The approval of this settlement was the result of a protracted process of which Mull-Kozak and Spece-Ibanez were very much a part. And it is not simply that they failed to object. As they admitted at the hearing the court held on the pending motions, they *knew from the beginning*, even

while they were urging the court to approve the settlement, that they would challenge the limitation on attorneys' fees after the settlement was approved and implementation was underway. They have intended all along to contend that the "settlement only" class was invalid and that therefore the limitation on their fees was unenforceable.

In these circumstances, there is another and more venerable basis for holding the attorneys to the settlement agreement. Their conduct is a classic example of behavior which invokes the doctrine of equitable estoppel. By their affirmative acts and their silence when there was clearly a duty to speak, they intentionally misled *everyone* in the case – the defendants, class counsel, the court and their own clients – into believing that they approved of the settlement, including the limitation on attorneys' fees. Reliance was placed on that misrepresentation, in that the court had no occasion to address any arguments that might legitimately have been made – if there were any – to the propriety of the limitation on attorneys' fees, or any other aspect of the settlement, and the settlement was approved. In further reliance on the apparently solid support for the settlement, the defendants, class counsel, attorneys for individual class members all over the country, and the court itself began the expensive process of implementing the settlement.

The court concludes that the attorneys are bound to the settlement and are estopped to disclaim it.

III. WHETHER THERE ARE 6,000 NEW OFFERS THAT HAVE REPLACED THE CLASS SETTLEMENT

The attorneys contend that various provisions of the releases tendered to class members by the defendants are either contrary to the terms of the settlement or unauthorized by its terms. This is the first step of the argument, and we will deal with it before going to the next step.

The major objection to the releases is the inclusion of the federal and state governments as releasees. The attorneys denounce this as a gratuitous imposition on the class members, unauthorized by the settlement agreement. We disagree. The settlement agreement contemplated that the parties would use their best efforts to obtain waivers of subrogation liens. Release of the federal government from claims by class members was necessary in order to obtain the government's waiver. Also, the settlement agreement provided that efforts would be made to free the defendants from third party claims for indemnification, and, if class members were free to sue the federal government, the government would in turn be free to claim over against the defendants. Therefore, the release provisions were altogether consistent with the intent of the settlement agreement and cannot be regarded as a departure from its terms.

Significantly, it appears that there have been no more than two claims by class members against the federal government, and neither is a client of these attorneys. Any prejudice to the class members from the requirement that the federal government be released, in return for

waiving its reimbursement claims, is nonexistent. No class members have objected to the requirement. The only objectors are Mull-Kozak and Spece-Ibanez, who seek to parlay the release requirement into a benefit for themselves. They completely ignore the fact that what they seek would be a substantial detriment to their clients. If this court were to hold that the class members could not be required to release the federal and state governments from liability, then the federal government and presumably many of the states as well would refuse to waive their claims for reimbursement. As indicated earlier in this opinion, those claims would severely impact the amount of money available to many class members from their $100,000 settlements.[4]

The attorneys also claim that the tendered releases depart from the settlement in that they call for unnecessary and inappropriate signatures. For the reasons expressed earlier in this opinion, *supra* at 4-6, the court disagrees.

Another alleged departure is that the releases waive claims for infections from viruses in addition to HIV, whereas the settlement concerned only HIV. The short answer to this is that the attorneys' argument is simply wrong. The settlement agreement does cover other viruses as well as HIV.

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[4] Another consideration for the release is that the federal government has agreed that receipt of the $100,000 payments will not be deemed to disqualify class members from entitlement to various income-related federal benefits.

The attorneys' final contention concerns Paragraph 14 of the release, which provides that the class member "would agree to the terms of this Release even if the Agreement were not part of a class settlement but rather a completely private settlement." The attorneys argue that this indicates an intent on the part of the defendants to abandon the settlement and enter into individual settlements with the releasors. But the court is satisfied by the defendants' response to this argument: Paragraph 14 was included in the release simply as a hedge against the possibility that some class member might later attempt to set aside the class settlement (just as the attorneys are attempting to do here). The court does not regard this release provision as inappropriate and certainly does not regard it as a recognition by the defendants that the settlement approved in the court's Order of May 8, 1997 is no longer the basis of the parties' obligations.

Even assuming that one or more of these release provisions were inconsistent with the settlement agreement, that would not mean that the settlement was voided or that the parties were free to ignore the Order of May 8. Any violation of the May 8 Order, an order which required the parties to carry out the settlement according to its terms, should have been brought to the attention of the court for appropriate action. It should not have been seized upon by these attorneys as a basis for arguing that the settlement is a nullity.

The next step of the attorneys' argument is moot because they have failed the first step, but we will address it anyway. It is this: because the releases depart from the settlement, they constitute offers to make new contracts with each of the 6,000 class members. Then, if

the class member signs the release, this constitutes an acceptance of the new offer.[5] Because the class settlement has been abandoned, the fee limitation does not apply in the new situation and the attorneys are now free to assert lien rights to their one-third contingent fees. The argument becomes murky at this point as to what the liens apply to. The attorneys have stated repeatedly that they do not claim a share of their clients' $100,000 settlements.[6] Yet, their contingent fee contracts are with those clients, not with the defendants. The only contract the defendants made to pay attorneys' fees was their commitment in the settlement agreement to deposit a $40 million fund from which the court would determine what fees are to be paid. In return for that deposit they were relieved of any other obligation in regard to attorneys' fees. What Mull-Kozak and Spece-Ibanez seek to do is to collect their one-third contingent fees from the fee fund established pursuant to the settlement. They contend that

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[5] This part of the argument is not altogether clear. If any of the Mull-Kozak and Spece-Ibanez clients have not yet executed and returned the releases, there would be no "new contract" in existence as to those clients. Indeed, Spece-Ibanez have asked the court to set aside some of the provisions they claim make the releases an offer of a new contract. It is not clear to the court whether the "new contract" argument applies only when the "offer" has been "accepted" by a return of the executed release in its present form, or whether the argument is intended to apply with full force – such as that may be – to the situation where all that has occurred is that the class member has received the proposed release but has not executed and returned it.

[6] On the other hand, Messrs. Mull and Kozak requested the defendants to include their names as payees on the settlement checks to their clients.

their liens attach to the fund, but we fail to see the logic of that argument. Even if the attorneys were correct in their position that the class settlement does not exist, the $40 million fund was nonetheless established pursuant to that settlement. Nothing about a failure of the settlement or the substitution of 6,000 new contracts would make the fund subject to any attorneys' liens. If the settlement fails, the fund would simply revert to the defendants.

Alternatively, the attorneys argue that they can enforce their liens against the defendants personally. If this were a case where the defendants had been served with valid attorneys' liens asserting fee claims against clients and had paid all of the settlement money to the clients without withholding the amount of the liens, the attorneys would have an action to recover the amount of their fees from the defendants personally. There would be no other way of enforcing the liens. However, that is not this case. Here, any claims these attorneys had against their clients for contingent fees were extinguished by the class settlement which the attorneys endorsed. A lien is only as good as the underlying claim for fees, and in this case there is no fee claim that remains against the clients.

The attorneys' argument that they have plausible claims for fraud or interference with contractual relations is also without basis.[7] Their threats to file such actions are

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[7] Ironically, it could be that the class settlement provides the attorneys their best hope of recovering *any* fees on the cases which have opted into the settlement. As we had occasion to note in the May 8 Order, $100,000 is modest compensation for the injuries these claimants have suffered. A verdict of many times that amount could reasonably be expected in any case

an effort to interfere with the class settlement to which they are bound, and any such actions must be restrained.[8]

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where the plaintiff prevailed on liability. The problem, as everyone connected with the case understands, is that many of the claimants face difficult hurdles in regard to liability (e.g., product identification and limitations), so that, for many class members, the practical choice was between accepting the $100,000 or receiving nothing at all. The court is aware that a variety of reasons may have motivated class members to accept the settlement, but it is probably true that most claimants who believe they have a reasonably good prospect of recovery have opted out. If this is a valid observation, then many of the clients of Mull-Kozak and Spece-Ibanez who have opted into the settlement, especially if they have done so based on the advice of their attorneys, are clients who do not have good prospects of recovering in individual lawsuits. The likelihood that Mull-Kozak or Spece-Ibanez would have collected any contingent fees in those cases is questionable. The class settlement, and the fee fund, may offer the attorneys the best chance of compensation for any work they have done on these cases, but they were not satisfied with that opportunity. Instead, they seek to have it both ways, clinging to the settlement fee fund but at the same time trying to collect percentage fees, as well. And "percentage" rather than "contingent" is the right term, for they are no longer merely hoping for a share of an uncertain recovery. Rather, they are putting in for a percentage of an established fund, with nothing contingent about it. After that bonanza, they would then turn to collection of compensatory and punitive damages from the defendants for "interference" with their contingent fee contracts.

[8] The authority for the injunctive portions of this order is the court's inherent power to enforce its own orders, the court's power and responsibility under Rule 23 of the Federal Rules of Civil Procedures to see to it that the class settlement is carried out according to its terms, and the All Writs Act, 28 U.S.C. § 1651(a), which provides that the court "may issue all writs necessary or appropriate in aid of [its . . . jurisdiction] and agreeable to the usages and principles of law."

The defendants are required by the Order of May 8 to proceed with the settlement and they are entitled to proceed with the assurance of the court that they will not be subjected to collateral litigation as a result of their compliance.

CONCLUSION

For the foregoing reasons,

The motion of Mull-Kozak to enforce the settlement is denied;

The motion of Spece-Ibanez for an order rescinding release provisions exonerating government bodies and for other relief, including discovery on the issue of fraud, is denied;

The motion of defendants for adjudication of liens is granted; and

The motion of defendants for enforcement of the order of May 8, 1997 is granted.

More specifically, it is hereby ordered that:

(A) Any purported attorneys liens asserted by attorneys Thomas W. Mull, Charles R. Kozak, Roy G. Spece, Jr. and Rose Ibanez against the fee and cost fund established in this case, or against any of the defendants personally, are hereby held to be null, void and of no effect. Said attorneys are hereby permanently enjoined from asserting or attempting to assert any such lien in any court or in any other manner.

(B) Said attorneys are hereby permanently enjoined from filing any suit in any court for purposes of challenging the fee limitation contained in the class settlement in this case or seeking to collect any fee for representing any opt-in claimant in this case, or seeking to recover damages from any of the defendants for interference with their alleged right to collect any fee for work on behalf of any opt-in claimant.

(C) The contingent fee contracts between the said attorneys and their clients who have opted into the class settlement are hereby declared to have been superseded by the settlement agreement and final Order of May 8, 1997 and are held to be of no force and effect. The compensation of these attorneys for work done on behalf of opt-in clients shall be limited to the fees awarded to them by this court from the fee and cost fund established pursuant to the class settlement in this case.

Date: February 18, 1998

ENTER:

/s/ John F. Grady
John F. Grady,
United States
District Judge

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

November 4, 1998

Before

Hon. Richard A. Posner, Chief Judge

Hon. William J. Bauer, Circuit Judge

Hon. Ilana Diamond Rovner, Circuit Judge

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION, Nos. 98-1438 and 98-1770 APPEALS OF ROY G. SPECE, JR., ROSE MARIE IBANEZ, and MULL & MULL.	APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION. No. 96 C 5024 JOHN F. GRADY, *JUDGE*.

IN RE MULL & MULL. No. 98-1629	**Petition for a Writ of Mandamus. No. 94 C 5324 John F. Grady, *Judge*.**

ORDER

On November 2, 1998, appellants (Roy G. Spece, Jr. and Rose Marie Ibanez) filed a petition for rehearing. All the judges on the original panel have voted to deny the petition. The petition for rehearing is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

FACTOR CONCENTRATE LITIGATION SETTLEMENT AGREEMENT

* * *

August 13, 1996

[p. 37] L. COST AND FEE FUND

1. Within 5 business days after signing this Agreement, each fractionator shall deposit into an interest bearing escrow account in a major U.S. commercial bank, designated by Lead Class Counsel and agreed to by the Fractionators (which agreement shall not be unreasonably withheld), its proportionate share of a $40 million Cost and Fee Fund, *i.e.*, Alpha $6,000,000, Armour $8,000,000, Bexter $8,000,000 and Bayer $18,000,000. Interest earned on the Cost and Fee Fund shall become part of the Cost and Fee Fund. In the event one or more of the Fractionators subsequently withdraws from this Agreement, but the Settlement goes forward as to at least one Fractionator, the proportionate share(s) of principal and interest in the Cost and Fee Fund shall be promptly refunded to the withdrawing Fractionator(s), after deduction of its/their proportionate share of the cost of Notice to Class members and any administrative costs incurred to the date of withdrawal. After all Court-ordered or Court-approved payments from the Cost and Fee Fund have been made, the principal or interest remaining in the Cost and Fee Fund, if any, shall be refunded to the participating Fractionator(s) in its/their proportionate share.

2. The Cost and Fee Fund shall be used to pay attorneys' fees and costs, as provided in paragraph L(4), as well as the costs of Notice provided for in Section D of this Agreement, the costs and fees of the Guardian *Ad Litem* provided for in Section I, the costs and fees of the Settlement Administrator or Special Master [p. 38] or other judicial officer, and the costs of processing the Claim Forms, including costs associated with the Dispute Resolution Process described in Section K. Approval of payments from the Cost and Fee Fund for Notice, for the Guardian *Ad Litem*, for processing Claims Forms and for the Dispute Resolution Process shall be the responsibility of Lead Class Counsel, subject to Court approval. The Parties shall request that the Court enter an Order providing that no attorneys' fees shall be payable by any class member other than those fees approved by the Court to be payable from the Cost and Fee Fund except as provided in paragraph L(4).

3. Such attorneys' fees and reimbursement of cost disbursements as the Court may award to Class Counsel, to members of the MDL-986 Plaintiffs' Steering Committee, and to any other attorney who represents one or more members of the Settlement Class shall be paid from the Cost and Fee Fund, except as provided in paragraph L(94).

4. Because it is the function of Class Counsel to provide information to Class members about this Settlement, any Claimant or Claimant Group who seeks the advice of an attorney other than Class Counsel on the question whether to participate in this Settlement shall be personally responsible for paying that attorney's reasonable charges, if any, for such advice. Any such charges

shall be on the basis of reasonable hourly rates for actual time expended on behalf of that client, and shall be subject to review by the Court. No attorney shall be entitled to any payment from [p. 39] the Cost and Fee Fund for advice that he or she has given a client on the question whether to participate in the Settlement.

5. In establishing the Cost and Fee Fund, the Fractionators are not conceding that aggregate fees and costs of $40,000,000 (or any other amount) should be awarded, and the Fractionators retain the right to object to applications for fees and reimbursement of costs. Under no circumstances, however, shall the Fractionators have any obligation whatsoever to pay any costs and fees other than their obligation to deposit $40,000,000 to establish the Cost and Fee Fund.

6. Class counsel, members of MDL-986 Plaintiffs' Steering Committee, and individual attorneys representing Settlement Class members shall petition the Court for awards of attorneys' fees and costs from the Cost and Fee Fund, which petitions shall be filed on a date to be established by the Court.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	MDL-986 93-C-7452 THIS DOCUMENT RELATES TO:
SUSAN WALKER, Administratrix of the Estate of STEVEN WALKER, Deceased, Plaintiff, vs. BAYER CORPORATION, et al., Defendants.	NO. 96-C-5024

PRETRIAL ORDER NO. 32

(Certification of Settlement Class,
Preliminary Approval of Settlement Agreement,
Authorization to Disseminate Notice, and
Dates for Memoranda and Applications)

Upon consideration of the Motion for certification of Settlement Class, for Preliminary Approval of the Factor Concentrate Litigation Settlement Agreement dated August 13, 1996 ("Settlement Agreement"), and for

Authorization to Disseminate Notice to the Settlement Class, and the Memorandum in Support thereof, and after consideration of the entire record in these consolidated proceedings, it is hereby ORDERED as follows:

1. The Settlement Class is defined as all living persons who, as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any Court of the United States, and who are or were:

> (a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),
>
> (b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates),

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute,

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a) (b), (c) or (d), and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or

more of the Fractionators and one or more non-Fractionators), as a result of which a payment or payments totaling $100,000 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled for $100,000 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to judgment in a trial Court, unless such person has his or her own Direct Claim that has not gone to judgment, *provided, however,* that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class;

(e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

2. David S. Shrager and Dianne M. Nast are hereby appointed Lead Class Counsel for the Settlement Class, and are authorized to carry out the duties of class counsel in association with members of the Court-appointed Steering Committee who shall serve as Class Counsel.

3. The Settlement Agreement (Exhibit A) is preliminarily approved and is sufficiently fair, reasonable and adequate to permit Notice to be disseminated to members of the Settlement Class.

4. The Notice ("Important Legal Notice") and the Summary-Notice which have been submitted to the Court, (Exhibits B and C), comply with F.R.Civ.P. 23 and are hereby approved. The Notice and Summary Notice in substantially the forms set out in Exhibits B and C shall be disseminated to members of the Settlement Class. The parties are directed promptly to submit to the Court for approval the Confidential Claim Form and Exclusion Form that the parties are now preparing in accordance with a letter agreement that has been made part of the record in this case.

5. The Notice Plan (Exhibit D) submitted by Plaintiff is approved, and all parties are directed to implement and carry out that plan within the timetable set forth therein.

6. On or before *August 16, 1996,* each Defendant, other than the National Hemophilia Foundation, shall provide

to Lead Class Counsel the names and addresses of all potential Settlement Class members, to the extent such names and addresses are known to any Defendant or can be identified through reasonable effort. Lead Class Counsel shall maintain all such names and addresses under strict confidentiality, limited to those persons necessary to implement this Order.

7. On or before *August 16, 1996,* all Defendants shall provide to Lead Class Counsel the names and addresses of each attorney or other person, reasonably known to them, who purports to represent a Settlement Class member.

8. On or about *August 20, 1996,* Lead Class Counsel shall mail the Notice and the Confidential Claim Form and Exclusion Form, by first class mail, to all Settlement Class members who can be identified through reasonable effort, and to attorneys and others identified pursuant to Paragraphs 6 and 7 herein.

9. On or about *August 20, 1996,* Defendant The National Hemophilia Foundation, shall mail the Notice, and the Confidential Claim Form and Exclusion Form, by first class mail (multiple copies of postage prepaid Notices to be provided by Lead Class Counsel) to each individual and organization on its mailing list.

10. On or about *August 20, 1996,* Lead Class Counsel will provide multiple copies of first class, postage prepaid Notices, and Confidential Claim Forms and Exclusion Forms, to each United States local Chapter of the National Hemophilia Foundation identified by it pursuant to paragraph 9 herein. Lead Class Counsel and the

National Hemophilia Foundation will request each such local Chapter to mail these documents to its members.

11. On or about *August 20, 1996,* Lead Class Counsel will provide multiple copies of first class postage prepaid Notices, Confidential Claim Forms and Exclusion Forms, to hemophilia membership groups which can be reasonably identified, including membership groups such as the Committee of Ten Thousand, The Hemophilia Foundation, The Hemophilia Association of Southern California, The Hemophilia Association of New Jersey, The Hemophilia/HIV Peer Association, all United States based centers and facilities and organizations listed in the current NHF Directory of Centers and Facilities, and the American Red Cross. Lead Class Counsel will request each such organization to mail these documents to all persons in the hemophilia community for whom addresses are available.

12. No organization, including The National Hemophilia Foundation, its local chapters, or other organization or association shall incur legal liability to Settlement Class members related to the mailing of notice.

13. On or about *August 30, September 3,* and *September 6,* 1996, Lead Class Counsel will cause the Summary Notice to be published in all national editions of *USA Today.*

14. On or about *August 30, 1996,* Lead Class Counsel will provide informational releases to radio, television and print media in the United States by utilizing the PR Newswire or similar services.

15. On or about *August 30, 1996,* Lead Class Counsel shall cause the Summary Notice to be posted, to the extent possible, on various computer networks that are

part of the Internet, including any appropriate bulletin board or other location which can reasonably be identified. Posting on such computer networks shall be done on a weekly basis, to the extent the computer networks will allow weekly posting, through and including the week of *September 16, 1996.*

16. The costs of the Notice shall be paid from the separate Cost and Fee fund provided for in Section L of the Settlement Agreement.

17. All Memoranda in Support of Final Approval of the Settlement shall be filed on or before *September 16, 1996.*

18. The confidential Claim Forms, requests for exclusion from the Settlement Class, any objections to the proposed settlement or to any application for attorneys fees and cost disbursements, must be postmarked on or before *October 15, 1996.*

19. A hearing to consider final approval of the Settlement Agreement shall be held on *November 25, 1996* at 9:30 a.m., Chicago local time, in Courtroom 2525, United States District Court, Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois 60604. This hearing may be adjourned without further notice.

20. The Court, in its capacity as fiduciary for all settlement class members, possesses and intends to exercise its authority, to approve and supervise all payments of attorneys' fees and reimbursement of cost disbursements for all counsel representing members of the Settlement Class, including the members of Plaintiffs' Steering Committee

and all individual counsel for any Settlement Class member. The Court intends to authorize such payments and reimbursements through the mechanism of the Cost and Fee Fund provided for in the Settlement Agreement, to which all applications for payment and reimbursement of expenses shall be made. All applications for fees and reimbursement of expenses by any attorney representing or purporting to represent any member of the Settlement Class, shall be filed with the Clerk of the Court by *September 23, 1996.* The Court retains its authority to modify contingent fee contracts entered into with Settlement Class members as necessary, to scrutinize carefully services performed an behalf of Settlement Class members, to ensure that compensation is reasonably related to services performed to members of the Settlement Class.

21. Lead Class Counsel and Defendants' Counsel are directed to cooperate in serving copies of this order upon every counsel in every pending federal and state lawsuit of which they are aware in which it appears that plaintiff is or may be a member of the Settlement Class as defined in Paragraph 1 of this Order.

Dated: 8-14, 1996

ENTER: /s/
John F. Grady,
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	:	MDL-986 93-C-7452
FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	:	THIS DOCUMENT RELATES TO:
	:	NO. 96-C-5024

IMPORTANT LEGAL NOTICE

TO: **ALL PERSONS WITH HEMOPHILIA WHO USED BLOOD CLOTTING FACTOR CONCENTRATES PROCESSED OR DISTRIBUTED FROM 1978 THROUGH 1985, AND WHO ARE (OR WERE) INFECTED WITH HIV AND THEIR ESTATES.**

PLEASE READ THIS ENTIRE NOTICE CAREFULLY
YOUR LEGAL RIGHTS MAY BE AFFECTED

YOU MAY BE ENTITLED TO RECEIVE $100,000

NOTICE CONCERNING SETTLEMENT

A proposed settlement in a class action lawsuit involving blood clotting factor concentrates is now pending in federal court in Chicago, Illinois and may affect your rights. Please read this Notice carefully.

If you or your family member is a person with hemophilia who used Factor VIII or Factor IX (Factor Concentrates) processed or distributed by any of the Defendants during 1978 through 1985 and are (or were) infected with HIV, you may be eligible to receive $100,000 as a result of

the proposed settlement. This settlement may be available to you if you or your family member have a lawsuit pending in federal or state court, or *even if you have not filed a lawsuit.* This Notice describes your rights.

DESCRIPTION OF THE LITIGATION

The Honorable John F. Grady, a Judge of the United States District Court for the Northern District of Illinois, has pending before him numerous cases filed by persons with hemophilia, their HIV infected spouses and children, and their estates. These lawsuits claim injury from the use of HIV-contaminated plasma-derived factor concentrates, specifically Factors VIII and IX.

The principal defendants in these suits are: ALPHA THERAPEUTIC CORPORATION, GREEN CROSS OF AMERICA CORPORATION and THE GREEN CROSS CORPORATION (collectively, "Alpha"), ARMOUR PHARMACEUTICAL COMPANY, RHONE-POULENC RORER INC. (collectively, "Armour"), BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL INC. (collectively, "Baxter"; which also refers to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter Healthcare Corporation), and BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which also refers to Cutter Laboratories, Inc., Cutter Laboratories, a division of Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.). These Defendants are referred to in this Notice as the "Fractionators."

These lawsuits allege that the Fractionators are legally responsible for HIV infections caused by factor

concentrates. The Fractionators have vigorously defended these lawsuits and deny any liability.

The Judicial Panel on Multidistrict Litigation consolidated all federal cases before Judge Grady in 1993. Thereafter, Judge Grady appointed a Plaintiffs' Steering Committee to conduct that litigation, including discovery of common issues, on behalf of all of those plaintiffs. Judge Grady has also attempted carefully to coordinate this consolidated federal litigation with the pretrial preparation of similar cases pending in various state courts.

On November 3,1994, the District Court certified a litigation class action to resolve certain issues which it believed were common to all cases. However, on March 16, 1995, in response to a petition filed by the Fractionators, the United States Court of Appeals for the Seventh Circuit held that these issues were not properly certified as a litigation class action and directed that the class be decertified. On January 16, 1996, the District Court issued an Order decertifying the litigation class.

There has been substantial litigation before Judge Grady concerning the merits of the lawsuits which have been filed against the Fractionators including: examining, analyzing, and classifying over a million pages of the Fractionators' documents; briefing and arguing dozens of discovery and other pretrial motions; obtaining, analyzing and conducting hundreds of depositions, including depositions of the Fractionators' employees, and former employees; conducting extensive investigation, including medical and scientific research, into those common issues in this litigation impacting on any legal responsibility of

the Fractionators; and retaining and presenting for deposition testimony medical and scientific experts.

On April 19, 1996, the Fractionators, without admitting liability, and to limit the time, expense and risks of continued litigation, proposed a nationwide settlement of all claims of all members of the Settlement Class (which is described below). In August, 1996, following extensive negotiations among the Parties, a comprehensive settlement agreement was reached.

Judge Grady has certified a Settlement Class for purposes of considering whether to approve that settlement, which is described in this Notice. If you are a member of the Settlement Class defined below, your rights are affected by this Proposed Settlement. You are eligible to file a claim to participate in this Settlement even if the Fractionators have defenses to your claim, such as the statute of limitations, that might otherwise defeat your claim if you have filed or later file your own separate lawsuit. If you meet the definition of a Settlement Class member as described in the next section of this Notice ("Description of the Settlement Class"), no defenses that a Fractionator may have will play any role in determining whether or not you are eligible for this Settlement.

DESCRIPTION OF THE SETTLEMENT CLASS

The Settlement Class consists of all living persons who, as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent

residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any Court of the United States, and who are or were:

(a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates),

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor

Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute,

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a), (b), (c) or (d), and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or more of the Fractionators and one or more non-Fractionators), as a result of which a payment or payments totaling $100,000 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled for $100,000 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own

Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to final judgment in a trial court, unless such person has his or her own Direct Claim that has not gone to judgment, *provided, however,* that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class; (e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

GENERAL ELIGIBILITY GUIDELINES

The following are merely general guidelines for eligibility and should not be read or understood to contradict the formal class definition outlined above which determines eligibility, To simplify matters, the basic guideline for eligibility is that each HIV infected person is generally

eligible to receive $100,000 from the Settlement if he or she used Factor Concentrates processed or distributed by any of the Fractionators during the period 1978 through 1985. Also potentially eligible are persons who contracted HIV through birth, or sexual relations with a spouse or eligible partner who took Factor Concentrates. However, as stated in the class definition, family members of such persons (those who have what the law calls derivative claims) are not separately eligible to receive $100,000, unless they themselves are infected with the HIV virus.

To illustrate, an HIV infected person with hemophilia who used Factor Concentrates processed by any of the Fractionators at any time during the period 1978 through 1985 is eligible to file a claim and, if approved, to receive $100,000 under the Settlement. If his wife is HIV infected as a result of sexual relations with him, she may also file a claim, and if approved, receive a separate $100,000. If they had a child who was also HIV positive through birth, this child would also be eligible to file a claim and, if approved, receive a separate $100,000. However, if the spouse or child is not HIV positive, they are part of the "Claimant Group" of the infected father or husband, and cannot file a separate claim for $100,000.

A claim may be also filed on behalf of a person who is deceased. In the illustration above, if the father had died, the executor of his estate, or his personal representative, can assert his claim. The same $100,000 payment will be made, just as though the father or husband were alive and had filed his own claim form. The same is true for a deceased spouse, or deceased child, who was HIV positive.

It is not necessary that the deceased person have died of AIDS. Death can be from any cause, so long as the deceased person met the definition of an HIV infected Settlement Class member (paragraphs A, B, or C above).

You are a member of the Settlement Class if you meet the definition on page 2, regardless of whether you already have a lawsuit pending in federal or state court, or have never filed any lawsuit. However, if you have filed a lawsuit against one or more of the Fractionators that has gone to judgment in a trial Court, you are probably not a member of the Settlement Class. In addition, this settlement offer is not available to people who choose to continue their lawsuits after the present Notice. *These individuals must choose either to participate in the present Settlement or to opt out and continue with their present lawsuits.*

The Fractionators have agreed that plaintiffs who previously settled claims with one, two or three (but not all four) of the Fractionators on or before April 19, 1996 for a total amount less than $100,000 are eligible to participate in the present Settlement up to a total of $100,000 (in other words, these individuals can receive the difference, if any, between the total of the previous settlement and $100,000) except that these claimants must be able to show that they used Factor Concentrate processed or distributed in the period 1978 through 1985 by at least one of the Fractionators with which they did not previously settle. For example, a Claimant who previously settled with Bayer and Armour for a total of $45,000 would be entitled to receive another $55,000, assuming

proof of use of Factor Concentrate processed or distributed by either Baxter or Alpha in the period 1978 through 1985.

PROPOSED SETTLEMENT AND PLAN OF DISTRIBUTION OF THE SETTLEMENT FUND

If you want to participate in this Settlement, you must file a Confidential Claim Form. This Form is included in the documents you received with this Notice. It says: "Confidential Claim Form and Exclusion Form" at the top. You must complete and return the form, postmarked on or before **October 15, 1996** to the address indicated. **All information you supply will be kept strictly confidential, by Order of the Court, and will not be published or disseminated in any way.** It will only be used, under strict and confidential supervision, to determine your eligibility to participate in the Settlement.

The Claim Form is designed so that you can complete it yourself. You do not need a lawyer.

Class Counsel have conducted discovery and investigation into the facts of the pending Lawsuits, have studied the general legal principles applicable to the claims in these Lawsuits, as well as the general legal principles applicable to claims that might be made by members of the Settlement Class who are not plaintiffs in the Lawsuits, and have concluded that a class settlement with the Fractionators in the amount and on the terms set forth in this Notice is fair and reasonable, and is in the best overall interest of the Settlement Class. However, it is also recognized that in those instances where individual lawsuits can be successfully litigated and you are willing,

preferably with the advice of an attorney, to assume the risks, the uncertainties, and the delay involved in the outcome of those lawsuits, you might obtain a larger net amount of compensation from an individual lawsuit than the $100,000 that you could receive from the present Settlement. On the other hand, if you pursue your own individual lawsuits, you might recover a lesser net amount or nothing. This is an individual decision which you must make based on your own circumstances.

Under the Settlement terms, the Fractionators will pay $100,000 for each approved claim, in full and final settlement of the class members' claim. The Claimant (and members of that Claimant Group) will thereafter be barred from any further legal action against the Fractionators and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecessors and successors concerning Factor Concentrate processed or distributed during the period 1978 through 1985.

If you accept this settlement, the $100,000 payment will *not* have any attorneys fees or costs deducted from it. Any attorney who has represented you will have to make application to Judge Grady for any counsel fee and reimbursement of costs, and any such payments will come from a separate fund which Judge Grady may approve, not from the $100,000 paid to you.

Acceptance of the Settlement will end all claims related to the use of Factor Concentrate that you have, or

may have, against the Fractionators. You cannot accept the Settlement, and also file or continue your own lawsuit against Fractionators in either federal or state court. However, acceptance of the Settlement does not affect your right to pursue any claims you have against any person or organization other than the Fractionators (and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecessors and successors). For example, if you have filed a lawsuit against some party other than the Fractionators, acceptance of this Settlement will not bar you from continuing with that lawsuit, but it could, depending upon the state law applicable to your claim, reduce your total recovery in that lawsuit, especially if the Fractionators were found to be partially responsible for your injuries.

The Fractionators have made the settlement proposal with a desire to achieve substantially complete participation by affected members of the community. Therefore, under the Settlement Agreement, if too many persons decide not to participate, the Fractionators have the right (but are not obligated to) withdraw the Settlement offer. The Confidential Claim Form which has been sent to you includes, at the end, an "Exclusion Form." The "Exclusion Form" must be completed and postmarked on or before **October 15, 1996** if you do *not* desire to participate in the Settlement.

The Settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that

might possibly be asserted – in which part or all of the $100,000 payment could be claimed by various public or private sector healthcare reimbursers or insurers, including Medicare and Medicaid-and issues relating to Class members' continuing eligibility for government programs such as Medicaid or Medicare payments. If these issues are not satisfactorily resolved, this Settlement will not go forward.

The Settlement is also subject to a decision by Judge Grady as to whether or not to approve the settlement as fair and reasonable to members of the Settlement Class. Judge Grady will make this decision after he conducts a final fairness hearing on the Settlement at the Chicago Federal Courthouse at 9:30 a.m. on November 25, 1996. This hearing, and your rights in connection with that hearing, are described below in the section titled "Final Fairness Hearing."

YOUR RIGHTS AND OPTIONS

If you are a member of the Settlement Class, you have the following rights and options.

A. *Your Right to Participate in the Settlement.*

You exercise this right by completing the enclosed Confidential Claim Form. You do not need a lawyer to file the enclosed Claim Form. The completed form, and all information contained in the form, will be treated as Confidential. ***Your Confidential Claim Form must be postmarked on or before October 15, 1996.***

If you choose to participate, and you submit a timely Claim Form and your claim is approved, and if the overall settlement is approved by Judge Grady after the Fairness Hearing (and his Order is upheld and becomes final, in the event an appeal is taken), you will then be eligible to receive a $100,000 payment. Remember, only a single payment can be made to an HIV-infected person. That will end all of your claims against the Fractionators concerning any alleged contamination of Factor Concentrate, and you will not have the right to pursue separate lawsuits against the Fractionators on such claims.

B. *Your Right To "Opt Out" of the Settlement.*

If you are a member of the Settlement Class, you have the right to exclude yourself ("opt out") from the Settlement Class. If you exclude yourself, you cannot participate in the Settlement described in this Notice, and you cannot receive any of the Settlement Funds. You can, however, pursue your own lawsuit with your own attorney.

To exclude yourself from the settlement class, you must complete the "Exclusion Form" which is enclosed. It is part of the "Confidential Claim Form and Exclusion Form" package on p. 5.) Print and sign your name, stating that you want to be excluded from the Settlement, and return the Exclusion postmarked on or before **October 15, 1996.**

The decision whether to exclude yourself from the settlement class is one that should be made with care, and after considering such factors as: (1) the strengths, merits,

and damages potentially recoverable in an individual case, and the risks of losing the lawsuit; (2) your desire to pursue or not pursue individual litigation against the Fractionators, and (3) the value to you of receiving from the Settlement Fund a definite, fixed amount at an earlier time, as opposed to your possible recovery in an individual lawsuit of a different amount in the future (which could be higher, lower or none at all). Each individual may have a greater or lesser chance to succeed in an individual lawsuit, depending upon the specific facts of each case, the applicable state law, including the applicable the statute of limitations, and other defenses available to the Fractionators.

If you decide to opt out of the settlement class to pursue your own individual litigation, you (and your individual attorney, if you have one) *MUST* sign a completed Exclusion Form and return it postmarked on or before October 15, 1996, *even if you already have a lawsuit now pending in federal or state court against these Fractionators over the same subject matter.*

C. ***Your Right to Support or Oppose the Settlement***

If you remain a member of the Settlement Class (in other words, you do not request to be excluded) you also have the right to support or oppose the Settlement at the Court Fairness Hearing. This right is described in more detail in the section of this Notice concerning the Court Fairness Hearing.

D. *Failure to File the Confidential Claim and Exclusion Form:*

If you are a member of the Settlement Class described in this Notice, and you "do nothing" – in other words, do not choose either to participate in the Settlement or exclude yourself ("opt out") from the Settlement Class – you will be barred from any further right to recover from the Fractionators for a claim concerning contamination of Factor Concentrates, even if you already have a lawsuit pending. You will not receive any money from the Settlement Fund, and you will also lose the right to pursue an individual lawsuit against these Fractionators.

FINAL FAIRNESS HEARING

Judge Grady will conduct a Fairness Hearing to determine whether the proposed settlement and plan of distribution is fair and reasonable for members of the Settlement Class. This hearing will be held on November 25, 1996 at the United States District Court, Northern District of Illinois, Eastern Division, Courtroom 2525, 219 South Dearborn Street, 9:30 a.m., Chicago local time. The Hearing may be adjourned without additional notice.

If you exclude yourself from the Settlement Class, this hearing does not concern you and you do not have the right to participate in the Hearing. If you remain a member of the Settlement Class, you have the right, if you choose, to file papers supporting or objecting to the Settlement, and to appear personally or through your attorney at this Hearing to speak in favor of, or in opposition to, the fairness and reasonableness of the proposed

Settlement. If you approve of the Settlement, you do not need to attend the hearing and do not need to send papers stating your approval.

If you remain a member of the Settlement Class, you do not need to be represented by an attorney to support or oppose the Settlement. If you desire to write in favor of or in opposition to the Settlement, you should state each reason you support or oppose the Settlement. Your statement must be postmarked on or before **October 15, 1996.** You must send copies of your statement to each of the following: (1) Clerk of Court of the United States District Court for the Northern District of Illinois, Eastern Division, MDL 986, 219 South Dearborn Street, Chicago, Illinois 60604; (2) David S. Shrager, Two Commerce Square, 2001 Market St., Philadelphia, Pa. 19103; (3) Dianne M. Nast, 36 E. King St., Suite 301, Lancaster, Pa., 17602; and (4) Sara J. Gourley, Sidley & Austin, One First National Plaza, Chicago, Illinois 60603. If you desire to appear and speak at the Fairness Hearing, so indicate in your statement. You do not have to appear at the hearing to write in favor of or to oppose the Settlement.

ATTORNEYS FEES AND COSTS

Attorneys fees and costs will not be deducted from the $100,000 Settlement amount sent to each eligible claimant who participates in the Settlement, except that if you consult an attorney solely to seek advice on the question of whether to participate in the Settlement, you will be personally responsible for paying that attorney's reasonable charges, if any, for such advice. All other payments will be made from the Cost and Fee Fund

established by the Fractionators. The maximum amount of this Fund will be $40 million, plus accrued interest.

If the Settlement is approved by Judge Grady, all requests for attorneys fees and reimbursement of costs – both for members of the Plaintiffs' Steering Committee, and for individual lawyers representing members of the Settlement Class – will require approval by Judge Grady before any such payments of fees will be made.

No fee payments approved by Judge Grady will reduce the settlement payment to Settlement Class members. Applications for costs and fees must be filed of record on September 23, 1996 with the Clerk of Court, United States District Court, Northern District of Illinois, Eastern Division, MDL 986, 219 South Dearborn Street, Chicago, Illinois, 60604, and will be available for your inspection there. If you object to any fee request, you must file your objection with the Clerk of Court at the above address and send a copy to the individuals listed in the "Additional Information" Section below. Any such objections must be postmarked on or before **October 15, 1996**.

The Court will also be requested to authorize payment from the Cost and Fee Fund for claims administration and for the costs of notice and similar costs. None of these costs will affect the Settlement amount to be paid to eligible claimants.

EXAMINATION OF PAPERS AND INQUIRIES

The Settlement Agreement has been filed and is available for inspection by any person during normal

business hours at the office of the Clerk of the United States District Court, Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois 60604. The Clerk's Office also has the pleadings, previous orders entered by the Court, and other papers.

Briefs and other papers of the settling parties in support of the Settlement will be filed with the Clerk of Court on or before September 16, 1996. Plaintiffs' Counsel's request for attorney fees and reimbursement of costs and expenses will be filed with the Clerk of Court on or before September 23, 1996. All such documents will be available at the office of the Clerk of Court for your inspection.

ADDITIONAL INFORMATION

ALL QUESTIONS RELATING TO THIS NOTICE MAY BE DIRECTED TO THE FOLLOWING PLAINTIFFS' COUNSEL

David S. Shrager, Esquire
Lead Class Counsel
SHRAGER, MCDAID, LOFTUS,
FLUM & SPIVEY
Two Commerce Square
2001 Market Street
Philadelphia, Pennsylvania 19103
(215) 568-7495 (Fax)

or

Dianne M. Nast, Esquire
Lead Class Counsel
RODA & NAST, P.C.
Suite 301
36 East King Street
Lancaster, Pennsylvania 17602
(717) 397-3669 (Fax)

You may call 1-800-836-9376, if you have questions. If you know of someone who wants to receive this Notice, please send his or her name to one of the attorneys listed above.

PLEASE DO NOT WRITE OR CALL THE COURT OR THE CLERK'S OFFICE FOR INFORMATION

Dated: August 20, 1996 By:

/s/_____
Clerk of the Court
United States District Court
Northern District of Illinois
Eastern Division
219 South Dearborn Street
Chicago, Illinois 60604

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE	)	MDL-986
FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	)	No. 93 C 7452
	)	THIS DOCUMENT RELATES TO ALL CASES
SUSAN WALKER, Administratrix of the Estate of Steven Walker, deceased,	)	
Plaintiffs,	)	No. 96 C 5024
v.	)	
BAYER CORPORATION, et al.,	)	
Defendants.	)	

FINAL ORDER AND JUDGMENT RELATING TO SETTLEMENT

This cause having come before the court for consideration of a final Settlement Agreement and for entry of a Final Order and Judgment, and after full briefing and hearings pursuant to notice where proponents and objectors were heard, and after consideration of the entire record in these consolidated proceedings, it is HEREBY ORDERED as follows:

1. The court has subject matter jurisdiction over this action, and all matters that relate to the settlement.

2. The court has personal jurisdiction over the representative plaintiff, Susan Walker; over the settlement

class members; and over the fractionator defendants (Alpha, Armour, Baxter and Bayer).

3. By order entered on August 14, 1996, this court certified a Settlement class defined as all living persons who, as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any court of the United States, and who are or were:

> (a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates);
>
> (b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates);

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates);

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute;

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a), (b), (c) or (d); and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or more of the Fractionators and one or more non-

Fractionators), as a result of which a payment or payments totaling $100,000.00 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct claim that has not previously been settled for $100,000.00 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to judgment in a trial court, unless such person has his or her own Direct Claim that has not gone to judgment, *provided, however,* that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class;

(e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional, certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

4. By order entered on August 14, 1996, this court preliminarily approved the Factor Concentrate Litigation Settlement Agreement dated August 13, 1996, and authorized dissemination of Notice of the Settlement Agreement to the Settlement Class Members.

5. The court finds that, pursuant to a Plan of Notice approved by this court, notice of the proposed Settlement Agreement was timely mailed to the Settlement Class Members, published as ordered in three (3) issues of *USA Today*, posted on the Internet, and provided to PR Newswire for informational releases to radio, television and print media in the United States.

6. The court finds that the notice given to the Settlement Class Members, which was approved by this court, fully and accurately informed the Settlement Class Members of all relevant and material elements of the proposed Settlement Agreement and afforded them an adequate time to decide whether to opt out of the settlement.

7. The court finds that the notice given to the Settlement Class Members constituted the best notice practicable under the circumstances, that the notice constituted valid, due and sufficient notice to all Settlement Class Members, and that the notice given was in such manner as directed by the court and in full accordance with Rule 23 of the Federal Rules of Civil Procedure.

8. On November 25, 1996, this court held a hearing pursuant to notice to consider final approval of the settlement. The court has considered the objections of persons opposed to the settlement and finds nothing in the objections to justify rejection of the settlement. The objections include:

> (a) the $100,000.00 settlement payment per claimant group is inadequate for the loss suffered;
>
> (b) insurance companies will receive the settlement proceeds or the recipients will be rendered ineligible for government assistance;
>
> (c) infection by Factor Concentrate used in the treatment of a disease called Von Willebrand Disease should qualify for inclusion in the settlement;
>
> (d) each family member should be able to assert his or her own independent claim, rather than being part of a "claimant group" of the infected person;
>
> (e) persons who have litigated and lost prior cases should not be barred from the settlement;
>
> (f) the settlement should be coupled with or made contingent upon passage by Congress of the "Ricky Ray Hemophilia Relief Act"; and
>
> (g) certain persons outside the United States who are neither citizens nor permanent residents and who wished to be included in the settlement should be included.

These objections are further discussed in section 10(E) *infra*.

9. In April 1997, the court received letters from Charles R. Kozak and Thomas W. Mull, two attorneys who represent substantial numbers of class members, asserting that plaintiffs' Steering Committee had not, prior to recommending the settlement, taken adequate account of certain liability theories Messrs. Kozak and Mull believe are substantially more likely to result in recoveries against the defendants than are the theories favored by the Steering Committee. The allegation by Messrs. Kozak and Mull was that, by ignoring the more viable liability theories, the Steering Committee failed in its obligation to obtain the maximum settlement value for the class. obviously, this contention went to the fairness of the proposed settlement, and, after a further exchange of correspondence with Messrs. Kozak and Mull and Mr. David S. Shrager, lead counsel for the class, the court determined that a further fairness hearing was required. That hearing was held on May 6, 1997, pursuant to notice. Mr. Kozak, Mr. Shrager, various members of the Steering Committee, counsel for the defendants, various other attorneys representing class members, and various members of the class appeared and expressed their views. At the conclusion of the hearing, the court was left with no doubt that plaintiffs' Steering Committee was fully aware of the liability theories referred to by Messrs. Kozak and Mull and had fully considered them in determining whether to recommend the settlement. It became clear that, contrary to their assertions, Messrs. Kozak and Mull had no "new information" that was relevant to the fairness of the proposed settlement. In fact, they stated that they were not opposing the settlement but instead were only urging the court to permit late opt-outs on the basis

that the class had only recently been advised of the "new information" they had supplied. For a number of reasons the court explained at the conclusion of the session, this suggestion was rejected.

10. The court has considered the settlement guided by the factors set forth in *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982). *See also Donovan v. The State of Fitzsimmons*, 778 F.2d 298, 308 (7th Cir. 1985). These include the following factors:

(A) 'The Strength of Plaintiffs' Case on Merits

Most class members are faced with significant problems of limitations, proximate cause and product identification, as well as the task of persuading a jury that defendants should be found negligent on the basis of acts and omissions that preceded discovery of the AIDS virus. (Only a few jurisdictions recognize strict liability in blood product cases.) These challenges have largely accounted for the fact that, of the 13 cases tried prior to preliminary approval of the settlement, 12 resulted in defense judgments. In one of those cases, a Jury verdict for the plaintiff was set aside and that decision was affirmed on appeal. *Jones v. Miles Lab, Inc.*, 705 F.Supp. 561 (N.D. Ga. 1987), *aff'd.* 887 F.2d. 1576 (11th Cir. 1989). Two of the 13 cases were reversed on appeal (one is currently subject to retrial). In one of them, plaintiffs had prevailed at trial, *Christopher v. Cutter Lab*, 53 F.3d 1184 (11th Cir. 1995), and in the other case, defendants had prevailed. *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638 (7th Cir. 1995).

After preliminary approval of the settlement, two additional cases have been tried to verdict. In the first,

JKB v. Armour Pharmaceutical Co., No. 49D01 9312-CT-1236 (Marion Superior Court, Indiana), a $2 million verdict was returned in favor of plaintiffs and against a single defendant. There was no issue as to product identification. The plaintiff's decedent was a minor and therefore there were no. arguable statute of limitations issues. Indiana has a strict products liability statute, Ind. Code § 33-1-1.5-1. The jury returned a general verdict, without differentiating between negligence or strict liability. The judgment is subject to appeal.

In the second case, *Howray and Brown v. Alpha Therapeutic and Armour Corp.* in the District Court for Harris County, Case No. 94-049929-A, a verdict was returned in favor of both defendants, Alpha and Armour, and against two infected plaintiffs, after four weeks of trial.

The results of the trials to date favor approval of the settlement because the settlement is a guaranteed sum certain for claimants who have elected to participate.

(B) Stage of Proceedings and Amount of Discovery Completed

This MDL litigation consists of over 200 federal law suits which have been consolidated for pretrial discovery purposes by the Judicial Panel on Multidistrict Litigation. Over the past three years, the parties have vigorously pursued discovery on the "core subjects" delineated in Pretrial Order No. 2, at ¶ 10, and thereafter modified by subsequent rulings. Those core subjects include: the use of, source and identification of blood and blood derivatives; viral infectivity of blood and blood derivatives used by plaintiffs; laboratory tests and results regarding

plaintiffs' HIV infection; general nature and treatment of hemophilia; knowledge concerning the risk of viral infectivity and HIV; warnings and information regarding viral infectivity and HIV; plasma collection practices, including donor screening; and viral inactivation. The Settlement Agreement was signed as that core discovery was being concluded.

The plaintiffs' Document Depository contains over 1.5 million pages of documents which have been reviewed and coded by plaintiffs' attorneys. The depository also contains over 850 deposition and trial transcripts which have been analyzed and digested by plaintiffs' counsel. In addition, the plaintiffs' Steering Committee has prepared for and taken or defended over 170 depositions. Records have been inspected in the United States and in Europe. Dozens of court hearings and pretrial conferences have been held and there have been numerous rulings on contested issues. The docket is over 70 single-spaced pages, one indicator of the extent of this controversy. It also reveals that almost 100 discovery motions have been adjudicated. It is abundantly clear that the proceedings are sufficiently advanced to allow the parties to fairly evaluate the settlement.

(C) The Complexity, Length, and Expense of Continued Litigation

This factor is to some extent addressed in (B) above. There are hundreds of filed lawsuits in state and federal courts which will be resolved through this settlement. Over 6,000 claims have been submitted to the Claims Administrator. If the filed lawsuits (putting aside the

claims which have not yet become lawsuits) were each to be tried individually, it would be at an enormous cost to the state and federal judiciary and to all parties. This factor favors approval of the settlement.

(D) The Absence of Collusion and the Opinion of Competent Counsel

The court is fully confident that there has been no collusion between class counsel and the defendants. Class counsel are competent and have conducted this litigation vigorously for the past four years. The court has had many opportunities to observe counsel since 1993 when the MDL was formed. The virtually unanimous support of plaintiffs' counsel for the settlement is a factor favoring its approval.

(E) The Degree of Opposition to the Settlement

There has been very limited opposition to the settlement. This court has seriously considered and weighed each objection and has determined, after careful review, that the objections do not require rejection of the settlement.

At the time of the November 25, 1996, fairness hearing, 52 persons had criticized or objected to the settlement. Most of the objections were in the form of letters, as opposed to formal court filings. These can be grouped into seven categories:

(1) The first group considers $100,000.00 to be inadequate for the loss suffered. In truth, this court would find it difficult to determine that

any particular amount is adequate to reimburse a spouse for the loss of a loved one, a child for the loss of a parent, or a parent for the loss of a child. But in our legal system, a monetary amount is frequently assigned to such claims for purposes of settlement. The court has considered many factors, including the results of the trials to date, defenses which might result in grants of summary judgment or defense verdicts, statutes of limitation, product identification problems, blood shield statutes, learned intermediary and other defenses. The court also notes that over 90 percent of potential class members have elected to participate in the settlement. While the court appreciates the difficultly in assigning a value to claims such as those asserted here, and understands that a $100,000.00 payment is modest for the injuries suffered by the class members, it has determined, under all the circumstances and considering all the relevant factors, that objections based upon the amount of the monetary payment are not a basis on which to disapprove the settlement.

(2) The second cluster of objections concerns subrogation and medical liens. As stated in the class notice, the settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that might possibly be asserted – in which part or all of the $100,000.00 payment could be claimed by various public or private sector healthcare reimbursers or insurers, including Medicare and Medicaid – and issues relating to class members' continuing eligibility for government programs such as Medicare or Medicaid payments. As stated in the notice, if these issues were not satisfactorily

resolved, this settlement would not go forward. Since satisfaction of subrogation and medical liens is a condition precedent to the settlement becoming final, the parties have worked for many months to accomplish that end. These issues have been resolved to the satisfaction of the parties and the court finds that the resolution of these issues is fair and reasonable. Therefore, these objections are moot.

(3) The third cluster of objections relate to Von Willebrand disease. The signatory parties to the Settlement Agreement take the position that persons infected with Von Willebrand disease are not class members and that the settlement was not intended to apply to such persons. This question of whether the Von Willebrand claimants are class members will be resolved in the claims' resolution procedure established pursuant to the Settlement Agreement and need not interfere with or delay approval of the settlement.

(4) The fourth set of objections relates to the concept of a "Claimant Group" pursuant to which claims are to be submitted on behalf of an entire Claimant Group (including spouses and children). It is the HIV infection of an eligible class member which results in the settlement payment. That settlement payment was offered in connection with the claim of each infected person, including his or her Claimant Group. The Claimant Group could either reject or accept the settlement. The court believes that a settlement whereby each member of the Claimant Group would be eligible for a separate $100,000.00 payment could not have been accomplished and thus, had plaintiffs insisted

upon that approach, there would have been no settlement payment at all. Rejecting the entire settlement would be unfair to the thousands of persons who seek to participate in the settlement, and the court rejects that alternative.

(5) The fifth group of objections was filed by a few persons who litigated and lost their cases prior to execution of the Settlement Agreement. The defendants were steadfast in their refusal to include these persons. Considering the benefits to the thousands of class members who wish to accept the settlement, the court will not reject the settlement because it does not include these persons.

(6) The sixth category of objectors does not actually oppose the present settlement but seeks instead to link its approval with congressional passage of the "Ricky Ray Hemophilia Relief Act," whereby it is proposed that the federal government would pay $125,000.00 to each person infected with HIV through the use of factor concentrate. Whatever may be the merits of this proposal, it is not the province of the court to engage in efforts to promote passage of legislation in Congress. The court does not find this objection to be a reason for disapproving the settlement.

(7) The seventh and final group of objections is presented by persons who are not citizens of the United States or permanent residents, and are therefore excluded from the class definition. (Since these persons are not class members, they are technically not objectors.) The parties are entitled to determine the parameters of the Settlement Agreement. The court does not consider it unreasonable to limit

the settlement to United States citizens or permanent residents of the United States, its possessions and territories, and will not reject the settlement based on this objection.

There were separate objections filed by Attorney James Carney, and the court ordered additional submissions in response to these objections. The court has determined that those objections, which were based on Mr. Carney's mistaken belief that there was significant evidence of liability that was unknown to plaintiffs' counsel, are without merit.

11. At the suggestion of plaintiffs' Steering Committee, the court appointed Robert K. Jenner as Guardian Ad Litem to represent class members who are minors or persons under disabilities. Mr. Jenner has represented plaintiffs in this litigation, has written a number of published articles about the legal questions presented and is well qualified to serve as Guardian. He has filed a thoughtful report, analyzing the liability issues and the difficulties of proof. He expresses the opinion that the settlement is fair and recommends it be approved. The report of the Guardian Ad Litem is approved.

12. The settlement does not satisfy everyone. Few class settlements do. But this settlement ends years of litigation and provides redress for thousands of claimants. Subsequent to the November 25, 1996, fairness hearing, the court has received numerous letters from class members supporting the settlement and earnestly requesting that it be approved as soon as possible. The court finds that class members have had an adequate opportunity to consider their individual circumstances, and to decide, in light of those circumstances, whether

their interests are better served by participating in the class settlement or by opting out and pursuing individual claims. The court concludes that the Settlement Agreement among the parties is fair and reasonable for the Settlement Class Members and is in accordance with Rule 23 of the Federal Rules of Civil Procedure. Accordingly, the settlement is approved.

13. The court orders the respective parties to implement the Settlement Agreement according to its terms.

14. The court finds and hereby orders that all members of the Settlement Class who have not filed a timely notice of exclusion from the Settlement Class have for themselves and any party claiming through them released and forever discharged the fractionator defendants and their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the fractionators and distributors for the fractionators, as well as all directors, officers, employees, agents, insurers, and counsel for the foregoing, as well as their predecessors and successors. The release and covenant not to sue shall be for all claims arising out of all injury, disease or harm of any kind that the HIV infected person and members of such person's Claimant Group allegedly suffered as a result of use of Factor Concentrate processed or distributed during the period from 1978 through 1985, as described in the Settlement Agreement, and such persons are forever barred from instituting, assigning, maintaining, collecting or prosecuting, claims against defendants.

15. The court finds and hereby orders that neither this Final Order and Judgment nor the Settlement Agreement shall constitute or be interpreted to be a finding of the validity or invalidity of any claim or defense or any cause of action alleged or pleaded in the litigation.

16. The court finds and hereby orders that neither this Final Order and Judgment nor the Settlement Agreement, or any fact, conduct or act involving the settlement proceedings shall be offered or received in any proceeding as evidence, an admission, an inference or presumption, except as may be necessary to enforce or consummate the Settlement Agreement or to support a defense of release or other theory of claim preclusion, issue preclusion or similar defense.

17. The court finds and hereby orders that any person who has heretofore submitted a timely and valid request for exclusion from the Settlement Class will not be bound or affected by the Settlement Agreement or any release or discharge as provided in the Settlement Agreement or in this Final Order and Judgment. The schedule of those persons who have heretofore submitted timely and valid requests for exclusion from the Settlement Class will be filed under seal by the Claims Administrator.

18. The court intends that a separate court order shall be entered regarding attorney fees and reimbursement of expenses to attorneys and law firms representing the Settlement Class. The court finds that the creation of the separate $40 million fund by defendants, from which plaintiffs' attorney fees are to be paid in amounts determined to be reasonable by the court, is fair and

reasonable to the Class. The court reserves its decision as to the allocation of the fund. The separate order for attorney fees and expenses shall not affect or disturb this Final Order and Judgment or any of the findings or orders included in this Final Order and Judgment.

19. Without affecting the finality of this Final Order and Judgment, the court reserves exclusive and continuing jurisdiction over these consolidated actions, the representative plaintiff, the Settlement Class Members, fractionator defendants, and each and all of their respective attorneys and law firms, for the purposes of supervising or determining the implementation, enforcement, construction and interpretation of the Settlement Agreement and all orders heretofore entered, for hearing and determining any motion or application by attorneys or law firms for an award of attorney fees and expenses, and for hearing and determining the final plan of allocation of the settlement.

20. The court finds and hereby orders that this Final Order and Judgment, and all the findings and orders included herein constitute a Final order and Judgment, and the court determines that there is no just reason for delay and directs entry of the Final Order and Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

DATED: May 8, 1997

ENTER: /s/ John F. Grady
John F. Grady, United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS PRODUCTS LIABILITY LITIGATION	)))))))	MDL – 986 No. 93 C 7452 Chicago, Illinois September 5, 1997 10:20 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

APPEARANCES:

For the Plaintiffs: SHRAGER, MC DAID, LOFTUS, FLUM & SPIVEY
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PO Box 12308
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Pensacola, Florida
32581, by

MR. JAMES R. GREEN

* * *

[p. 115] Court to cancel a trial date, and they attempted to again overthrow the committee because we were not pursuing certiorari to the Supreme Court to set aside the Seventh Circuit opinion, which he now refers to in support of an argument to enhance his clients' financial interest in the fund.

So let me get to the question. The question was what work should be covered. We all agree on two categories. One, we all agree that the negotiation, processing, the effectuation of the settlement; that is, the class action work, is, of course, to be covered. There is no dispute. That work, I would point out, however, continues. So it is past work and future work. The payment process that we are now in could be as difficult and thorny as even the work which preceded it, and it was, I assure your Honor, complicated and extending over many, many months.

Secondly, there is what the Court called, and I think it is a good label, the hometown lawyer efforts. This is work by attorneys on cases that –

THE COURT: By the way, I want to credit Judge Bechtel for that phrase, hometown. He has talked about that at our MDL meetings, and it seems to me a good,

useful designation and tells you who we are talking about.

MR. SHRAGER: Right, it is descriptive.

And what you have there are two, really two, categories when you think about it. You have got the hometown

* * *

[p. 118] number, Roy, I would be happy to fax you on that letter.

. here is then the third category to be covered, to go back to the Court's question. It is the most important category. And it is one in which obviously Mr. Berkman has been struggling and, if I may say, waffling a bit. He takes the position, and; that is, what about the MDL work that brought this about; what about what happened in the year starting in – I guess we were formally organized in 1994, '95, '96, into August, when an agreement is ultimately negotiated – what about the work that went up to that point and that now continues?

He has suggested, if I may say, very cleverly a position that between the lines goes as follows. On top of the lines, what he says is let's wait until the opt-out and see who is in the settlement. And Mr. Beck echoes that, too. What they have in mind, Judge, is returning to find out who supported the settlement and who didn't as they see it.

I want to recall for the Court that when this case was negotiated, under its terms, and as Rick Berkman has so many times said today, the master document, the defendants had the option at our suggestion and advice, which they ultimately accepted, to look at those who decided to

participate, the number of opt-outs, and decide whether they wished to proceed. There were, I believe, about 800 lawsuit cases.

I don't know how many, 600 went in, a couple hundred [p. 119] others were started. There's now about 550 opt-outs. I predict by the time they are done there may be conceivably, conceivably, over 200 opt-outs. A lot of those cases will fold when push comes to shove. But what argument they are really making is that they want to be able to find out who put cases in and who didn't.

THE COURT: I am not sure I follow.

MR. SHRAGER: They want to find out how many – in other words, if we would put in – if we could tell them today that all but 50 cases were going into the settlement, Rick Berkman would get up and stipulate that we should get the entire $40 million fund. There would be no doubt about it, and he will agree to that. He will agree to that. He has told me that many times. He has been totally candid with us.

What they are saying is, and this is where, frankly, they get stuck in their own position, the MDL effort is entitled to credit to the extent it – a common effort produced a common benefit to the class that came into being. That is fundamental. The fact that cases opted out, some number of cases opted out, that is endemic in any class settlement. So a number of cases are out. It is a number that the defendants accepted as reasonable when they decided to go forward with the offer.

The question of what should go in in terms of the MDL effort to me is a question simple to answer: A fair proportion

* * *

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FAX: (520) 577-7009

October 24, 1997

LETTER WITHOUT EXHIBITS VIA TELEFAX;
LETTER WITH EXHIBITS VIA MAIL, MONDAY DELIVERY

The Honorable John F. Grady
United States District Judge
U.S. District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, IL 60604

Dear Judge Grady:

Thank you for your October 23, 1997, letter. Rose Marie Ibánez and I (hereafter "counsel") understand that it is your obligation to monitor these matters. I enclose, as "Exhibit "A," counsel's first response to Mr. Murphy's ridiculous allegations. However, because of the fractionators' manipulations, which will be fully explained below, counsel must now more fully respond. We ask, however, that this letter be placed in the file under seal, denoting that it shall not be republished or ever used in any way to prejudice Mr. Murphy. We will be sending a separate letter to you and the Honorable Bernardo Velasco only that will further illuminate the fallaciousness of Mr. Murphy's allegations. We request that you consider the instant letter as a supplement to our Response and Counter-Motions to the fractionators' Motion To Enforce Order.

As Your Honor will see from the documents submitted herewith, the fractionators knew or reasonably

should have known that Mr. Murphy's letter contained falsehoods from the moment they received it. Their republication of the letter in these circumstances in unethical, illegal, and is additional proof of the bad intent alleged in our Response and Counter-Motions to the fractionators' Motion To Enforce Order.

Mr. Murphy alleges that counsel did not timely disclose to him the new opt-in option. He states he learned about it "a couple weeks ago" from September 13, 1997. This is unlikely, however, unless, which is even more unlikely, Mr. Murphy has a direct pipeline into the fractionators' or Steering Committee Lead Counsel's office. (It does appear, however, that Mr. Murphy is obtaining erroneous "legal" advice from some third party, and we will be conducting discovery on this matter.) Counsel first became aware of the new option as a choice rather than a rumor at the September 5, 1997, hearing before Your Honor. At that time, I requested a copy of the pertinent correspondence. (See transcript pages, Exhibit "B" hereto.) Then, on September 8, 1997, counsel received the relevant communication, an August 28, 1997, letter from the MDL Plaintiffs' Steering Committee's lead Counsel David Shrager to "Attorneys Representing Persons Who Previously Opted Out of the Class Action Settlement." (Exhibit "C," date-stamped correspondence.)

This correspondence did not make clear, however, whether persons (such as Richard Murphy) who had already lost on summary judgment were eligible. In the first opt-in period, counsel had attempted to opt-in one of our clients who had lost on summary judgment, and, at that time, counsel were told that such persons were not eligible. Therefore, on September 12, 1997, Rose Ibánez

wrote to Claims Administrator, Special Settlement Counsel, *and Sarah Gourley, counsel for the Fractionators,* stating: "Are my clients who were found to be barred by the Statute of limitations but had appeals pending at the time the original offer to opt-in was sent now eligible to opt-in even though at the earlier time I was told they were not eligible?" (Exhibit "D.") Having not received an answer after more than two weeks, Rose Ibánez wrote (via telefax) again to the same persons: "May I please have a response to my enclosed September 12, 1997 letter?" (Exhibit "E.")

Moreover, although counsel did not want to get our clients who fit within the just described category to raise their hopes only to be disappointed by being told later that they were not eligible, we felt we had to approach them at this point. Therefore, counsel finally reached Mr. Murphy on October 2, 1997. He decided to opt-in, and Rose Ibánez faxed a letter to that effect to the Special Settlement Counsel that very date. (Exhibit "F.") In other words, Mr. Murphy was fully informed about his *possible* eligibility and prophylactically opted-in before counsel were even informed about his eligibility and many days prior to Judge Velasco's October 8, 1997, letter to all counsel. *Counsel's inquiry regarding the eligibility of person's in Mr. Murphy's shoes has still not been answered, and we request that Your Honor Order the fractionators to immediately respond.* Mr. Murphy needs the answer forthwith so he can make decisions – such as probable retention of new counsel – with full information.

Thus, Your Honor, the fractionators knew or had direct access to the information about Mr. Murphy's attempted opt-in many days before when they received

Mr. Murphy's letter from Judge Velasco. Furthermore, Your Honor, all the fractionators had been apprised on October 4, 1997, by the enclosed pleading (Exhibit "G") that one of counsel's Hispanic clients was opting in this go around. Therefore, there was absolutely no reason for the fractionators to give any credence to Mr. Murphy's unsubstantiated "suspicion" that our clients were not being given information about the new opt-in opportunity.

The fractionators also knew or reasonably should have known that Mr. Murphy's allegation that "a disproportionately large number of plaintiffs, especially in the Tucson area, opted out of the settlement last year." Of course, the fractionators believe that virtually all opt-outs are disproportionate, but they knew our clients have opted-in and out proportionate to the ratios among those represented by responsible counsel all over the country and after being given information based on criteria espoused by Mr. Shrager and others. Indeed, these criteria were long ago articulated in open court when the Honorable Pima County Superior Court Judge Robert Buchanan ordered us to indicate which clients would opt-out were Your Honor to approve the sending of election papers within the litigation class.

Why, then, Your Honor did the fractionators further publish Mr. Murphy's letter when they knew it was filled with error? They did it to drive a wedge between us and our clients so as to encourage opt-ins and to discredit us as a viable source of opposition and disclosure of the truth about their heinous conduct. On the latter point, consider Exhibit "H,") the affidavit of Dr. Thomas Asher that counsel just obtained for the Arizona litigation. Dr.

Asher formerly worked for one of the fractionators and the CDC, he was on the Board of Directors of the American Blood Resources Association, he was the CEO of his own blood company in the 1970's and 1980's, and he opines that the fractionators' probable conduct was in conscious disregard of serious danger to consumers. We have also retained for the Arizona litigation Professor Clark Havighurst of Duke University Law School, who is the leading health care antitrust authority in the United States. He has pointed that the fractionators violated the U.S. antitrust laws by acting in concert to squelch competition as to safety of commercial factor concentrates.

Counsel believe the above should answer your concerns *and* buttress our previous request for sanctions against the fractionators. However, if you wish and you provide us immunity from any charge of breaching attorney-client confidentiality, we will forward copies of letters we sent to each client confirming their election whether to opt-in or opt-out in this latest election period.

Sincerely,

/s/ Roy G. Spece
Roy G. Spece, Jr.

RGS:mhs
encs.
cc: Hon. Bernardo P. Velasco; David Shrager, Esq.; Geoffrey Smith, Esq.; and Mr. Richard Murphy

EXHIBIT 8

FACTOR CONCENTRATE LITIGATION RELEASE

FOR CLAIM NUMBER(S): _____
FOR HIV-POSITIVE PERSON: _____

THIS RELEASE (hereafter the "Release") is entered into as of the date of the last signature below by and between all individuals who have signed this Release (including but not limited to all Releasors identified on Exhibit A attached), (these individuals, including all Claimants and other members of the Claimant's Group, collectively referred to as "Releasors") and ALPHA THERAPEUTIC CORPORATION, GREEN CROSS CORPORATION OF AMERICA and THE GREEN CROSS CORPORATION (collectively, "Alpha"), ARMOUR PHARMACEUTICAL COMPANY, RHONE-POULENC FORER INC. (collectively, "Armour"), BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL, INC., (collectively, "Baxter"; which shall also refer to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter Healthcare Corporation), BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which shall also refer to Cutter Laboratories, Inc., Cutter Laboratories, a division of Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.) [Alpha, Armour, Baxter and Bayer are hereafter referred to as the "Fractionators" or "Released Parties"]. Releasors and Released Parties are collectively referred to as "the Parties."

WHEREAS, some or all of Releasors may have certain claims arising under their own individual suits (if any)

against one or more of the Released Parties and/or any purported class actions including, but not limited to, the class action suit styled *Walker v. Bayer Corp., et al.*, filed in the United States District Court for the Northern District of Illinois, as Civil Action No. 96C 5024 (these individual and class actions collectively referred to as the "Litigation"); and

WHEREAS, the Litigation against Released Parties seeks damages allegedly sustained by one or more of Releasors as a result of an alleged infection with the HIV virus and other viruses related to plasma factor concentrates and derivatives used for the treatment of hemophilia during the period 1978 through 1985 (hereafter "Factor Concentrates") processed or distributed by any or all of the Released Parties (hereinafter referred to as the "Incident"); and

WHEREAS, Released Parties have denied and continue to deny that they have any liability to Releasors as a result of the Incident or with respect to any claims asserted in the Litigation; and

WHEREAS, the government of the United States of America, certain relevant state governments, and certain private health insurance providers have agreed to release certain rights those governments or insurers have or may have had to reimbursement/subrogation from Releasors and Released Parties for payments made on behalf of any of Releasors to medical treaters through Medicare, Medicaid and/or certain other federal and state funded health care plans and private insurance programs; and

WHEREAS, the Parties, having been provided with notice of and agreeing with and accepting the terms and

provisions of the Factor Concentrate Litigation Settlement Agreement (the "Agreement" with the terms as defined therein being applicable in this Release) approved by The Honorable Judge John Grady in the Litigation currently pending in the United States District Court for the Northern District of Illinois, Eastern Division; and

WHEREAS, Releasors, voluntarily and with full knowledge of their rights and the provisions of this Release, and having had the opportunity to obtain the benefit of the advice of counsel, now wish to settle, compromise, and dispose of the above-described claims and the Litigation, and any other claims that they have or might have against Released Parties related to the Incident upon the terms and conditions set forth below; and

WHEREAS, in the absence of a fully executed Release from Releasors, Releasors will not receive payment under the Agreement or be entitled to any of the other benefits of the settlement. Furthermore, Releasors acknowledge that as to a Claimant or Claimant Group member who does not sign this Release and who pursues a lawsuit against the Fractionators related to the Incident, the Fractionators may assert, and a court may decide, that any such lawsuit is barred by the failure of the Claimant or Claimant Group member to exclude himself from the settlement (to "opt out") prior to October 15, 1996; and

WHEREAS, Released Parties, without any admission of liability, now desire to settle, compromise, and dispose of the above-described claims and the Litigation upon the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the above premises and the mutual covenants, and intending to be

legally bound thereby, as well as in consideration of the Settlement Consideration set forth below, the Parties enter into the following agreement:

1. Releasors, for themselves, and their heirs, personal representatives, common law and statutory beneficiaries, survivors, successors, subrogees and assigns do hereby forever remise, release, acquit, and discharge Released Parties, and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as all suppliers to Released Parties and distributors for Released Parties, as well as all directors, officers, employees, agents, shareholders, insurers and counsel of each of the foregoing as well as their predecessors and successors, from any and all causes of action and damages (including without limitation damages for emotional injuries), and other liability or relief of any nature whatsoever, past, present or future, whether known or unknown, foreseen or unforeseen, whether in law or in equity, that Releasors ever had, now have, or hereafter may have, by reason of or arising out of any matter, cause, or event occurring on or prior to the date of this Release, arising out of or in any way relating to the Incident. It is expressly understood and agreed by Releasors that this is a full and final release of all matters whatsoever relating to the Incident as to Released Parties and is intended to and does embrace not only all known and anticipated damages and injuries, but also unknown and unanticipated damages, injuries, or complications that may later develop or be discovered, including all effects and consequences thereof.

2. It is the intention of the Parties and is understood by Releasors that this Release will forever bar Releasors

and anyone claiming through them from maintaining any action or claim whatsoever against any and all Released Parties which arose or which might arise in the future from any acts, omissions, agreements, or other occurrences relating to the Incident. The Parties intend that Released Parties obtain through this Release total and final peace, satisfaction and protection from any liability arising from any and all claims of Releasors and anyone claiming through them, whether or not previously asserted; and from any and all claims for joint tortfeasor liability, contribution or indemnity, including claims by any subrogees or assignees of any of Releasors, asserted by any person or entities arising from the Incident or which was or could have been asserted in the Litigation. The Parties further intend to exercise their best efforts to obviate the necessity and expense of Released Parties appearing in and defending any action commenced by any of the Releasors and anyone claiming by or through them asserting claims against any other person or entity arising from the Incident, or which could have been asserted in the Litigation. (Such other unreleased persons or entities are hereafter referred to, along with all subrogees and/or assignees of Releasors, as "Third Parties".)

3. The intent of the Parties is to protect Released Parties to the maximum extent possible, from any liability for contribution or indemnification claims that might otherwise be asserted by Third Parties who have been sued or may in the future be sued by Releasors for the Incident. The effect of this Release shall be to reduce any judgment obtained by any Releasor against any such Third Party by the amount, percentage or share of such

judgment attributable to Released Parties as may be necessary to bar, discharge, and release under applicable law any claims for contribution or indemnification against Released Parties arising from or related to the claims. In the event that any Releasor obtains a judgment against a Third Party and such Third Party obtains a judgment over, in whole or in part, against one or more of Released Parties for contribution or indemnification arising from the claims, then Releasors will be required to reduce or remit any judgment or portion thereof obtained from the Third Parties by the amount of the judgment over against Released Parties. To the extent a judgment obtained against any Third Party for the Incident would result in the imposition of liability for contribution or indemnification against the Released Parties, Releasors agree not to enforce any such judgment. In the event Releasors reach a settlement with Third Parties, settlement documents between Releasors and Third Parties shall provide that the Third Parties relinquish any claims for contribution or indemnification for the Incident against Released Parties.

4. Except as set forth in Paragraph 5 below, Releasors reserve the right to assert claims against all Third Parties, including any of the non-released defendants in the Litigation, and reserve also the right to assert claims that those Third Parties, and not the Released Parties, are solely liable for damages arising from the Incident.

5. Releasors agree to waive, release, and discharge any and all rights they may have to assert claims, causes of action, and administrative or other proceedings arising out of Claimant's use of Factor Concentrates, as defined in the Agreement, including, but not limited to, the use,

administration, regulation, processing, and distribution of Factor Concentrates, against the United States of America, its federal employees, representatives, agents, agencies, and instrumentalities, and each and every individual State, Commonwealth, Territory or Possession which by agreement with the Fractionators has released its claims against Releasors to reimbursement and subrogation related to the Agreement. Releasors do not, however, waive any rights that they may have to any entitlement or right to compensation which may be provided after May 1, 1997 by the legislature of any state, federal or other government.

6. As consideration for this Release, Released Parties will provide as described under Paragraph 7 below compensation to Releasors collectively in one of the following ways: (i) in the amount of One Hundred Thousand Dollars ($100,000) or in such lesser amount as Releasors may be entitled to receive under the Agreement paid to the Total Control Account for Releasors; or (ii) in periodic payments that shall have a total cost to Released Parties of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to under the Agreement; or (iii) in the amount of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to receive paid to the trustee of an "A" or "C" special needs trust for the benefit of Releasors; or (iv) in some combination of (i), (ii) and (iii) having a total cost to Released Parties of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to receive under the Agreement

(such lump-sum amount and such cost of periodic payments, or such combination thereof, are hereinafter referred to as the "Settlement Consideration").

The Settlement Consideration provided by the Released Parties to the Releasors as set forth in this Paragraph is not being credited to the account of any Releasor nor being set apart for the Releasors, nor otherwise made available to Releasors so that they may draw upon it at any time. Rather, Releasors' receipt of such Settlement Consideration is conditioned upon the certification by Special Settlement Counsel that appropriate documentation, including this Release, has been provided by, or on behalf of Releasors to that Special Settlement Counsel, along with court approvals where necessary.

7. Released Parties shall pay the Settlement Consideration in accordance with the terms of the Factor Concentrate Litigation Settlement Grantor Trust (hereinafter the "Settlement Grantor Trust"). This Release shall be effective with respect to the Releasors upon the first to occur of the following transfers:

a) The transfer from Metropolitan Life Insurance Company, as issuer of a guaranteed interest contract ("GIC") owned by the Settlement Grantor Trust, to a Total Control Account® for the benefit of the Releasors of the sum of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to receive under the Agreement, plus interest thereon in accordance with the terms of the Settlement Grantor Trust.

b) The transfer from (i) MetLife Trust Company, National Association, as trustee of the Settlement Grantor

Trust, to Metropolitan Insurance and Annuity Corporation of the sum of One Hundred Thousand Dollars ($100,000) or a lesser amount in accordance with the terms of the Agreement for a Qualified Assignment Agreement and Release, and (ii) to Metropolitan Life Insurance Company, as issuer of a guaranteed interest contract ("GIC") owned by the Settlement Grantor Trust, to a Total Control Account® for the benefit of the Releasors, of the excess of the amount to which Releasors are entitled under the Agreement over the amount transferred under (b)(i), and the interest on the amounts transferred under (b)(i) and this (b)(ii) in accordance with the terms of the Settlement Grantor Trust.

c) The transfer from MetLife Trust Company, National Association as trustee of the Settlement Grantor Trust to MetLife Trust Company, National Association, as trustee of the "A" or "C" trust for the benefit of the Releasors, of the sum of One Hundred Thousand Dollars ($100,000), or such lesser amount as Releasors may be entitled to under the Agreement, plus interest thereon in accordance with the terms of the Settlement Grantor Trust.

8. Payment of the Settlement Consideration pursuant to the terms of Paragraph 7(a), (b) or (c) above constitutes full and final settlement payment to Releasors. Following such payment, no further payment or consideration of any kind in connection with the termination and settlement of the Litigation is contemplated or required by Releasors. Released Parties bear no responsibility or liability for any failure on the part of the Special Settlement Counsel and/or the Trustee of the Settlement Grantor Trust to properly allocate among

members of a Claimant Group or distribute the Settlement Consideration. The execution of this Release by Releasors is a material inducement to the Released Parties in paying the Settlement Consideration pursuant to the terms of the Agreement and/or the Release.

9. The Parties agree to execute any and all required supplemental documents and to take all steps which may be reasonably necessary to give full force and effect to the terms of this Release and to effect dismissal of all claims and actions against Released Parties, including the Litigation.

10. Except as otherwise set forth in the Agreement, the Parties shall bear their respective costs and attorney fees. The monetary obligations of Released Parties to Releasors' attorneys are expressly limited to the court approved costs and fees as set forth in the Agreement.

11. Releasors represent and warrant that they have full power and authority to make, execute, and deliver this Release, and that to their knowledge and belief no other individual related to the Releasor has a claim against Released Parties arising out of the Incident related to the undersigned Releasors or which could have been raised in the Litigation, which is not here released.

12. Releasors represent and warrant that they have not sold, transferred, conveyed, assigned, or hypothecated any of their rights, either collectively or individually, in whole or in part, in any of the matters released herein.

13. Releasors represent and warrant that they have had an opportunity to consult attorneys of their own

choice to advise them fully of their rights under this Release and the meaning and effects of this Release and that if any Releasor has not consulted an attorney, that Releasor has knowingly and voluntarily elected not to do so.

14. Releasors represent and warrant that they understand that it is their decision and their decision alone whether or not to sign this Release. Releasors further represent and warrant that in agreeing to the terms of this Release, they have not relied on any finding of the fairness of the terms of the Agreement and/or this Release by any Court, including any determinations made by the Court in the *Walker v. Bayer Corp. et. al* action in the United States District Court for the Northern District of Illinois or in the MDL proceedings pending in that same Court. Rather, Releasors have reached their own decisions as to the fairness of the Agreement and this Release in consultation with counsel of their choice or have voluntarily elected not to consult with such counsel. Releasors also represent and warrant that they are not relying on the Court's order barring the filing or pursuit of individual claims and they would agree to the terms of this Release even if the Agreement were not part of a class settlement but rather a completely private settlement.

15. Releasors represent and warrant that to their knowledge and belief, there are no liens or claims of any kind which have not been discharged by a prior agreement and which could be asserted or made against the Settlement Consideration or against Released Parties as a result of any HIV or AIDS-related medical treatment provided to any Releasor other than those private or public

subrogees who have agreed to waive their claims and are identified in the notice sent with this Release to Releasors. If there are any such outstanding liens, Releasors agree to satisfy those liens from the Settlement Consideration.

16. If any provision or any part of any provision of this Release shall for any reason be held to be invalid, unenforceable, or contrary to public policy or any law, then the remainder of this Release shall not be affected, provided that the portion which is held invalid, unenforceable, or contrary to public policy or law does not constitute a material part of the consideration of one of the Parties.

17. Releasors state that they have carefully read this Release, have signed it as their own free act, and intend to be legally bound thereby. This Release is not subject to any assertion of mistake of fact or law.

18. Releasors declare and understand that no promises, inducements, or agreements not herein expressed have been made to them and that this Release contains the entire agreement among the Parties hereto and that the terms of this Release are contractual, and not a mere recital. Releasors further represent that they are under no legal disability material to their ability to execute this Release.

19. In conjunction with the signing of this Release, Releasors shall also execute the medical release attached as Exhibit B to this Release ("the Medical Release") which will authorize the release of certain medical records necessary for the finalization of the settlement. The Medical Release shall be subject to all of the strict confidentiality

provisions of the Agreement, and will be used for no other purpose than the implementation of this settlement.

20. Because this Release applies to persons throughout the United States, to ensure uniformity in interpretation and to take advantage of a highly developed body of law familiar to the court presently presiding over *In re Factor VIII or IX Concentrate Blood Products Litigation* MDL-986, No. 93-C7452 (N.D. Ill.) and *Walker v. Bayer Corp. et al.*, No. 96C 5024 (N.D. Ill.), which has jurisdiction over all of the Parties, this Release was negotiated with counsel in those cases and shall be construed and interpreted in accordance with the laws of the State of Illinois (excluding Illinois choice of law rules).

21. This Release may be executed in counterparts, each of which is to be an exact copy of the original Release and each of which shall constitute an original, and all of which shall constitute one and the same instrument. This Release shall become effective and binding, subject to all conditions set forth herein, when it has been executed, in counterparts or otherwise, by all Releasors.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the Releasors have executed this Release as of the date of the last signature.

PLEASE READ ENTIRE AGREEMENT BEFORE SIGNING

Releasors

Signature

Name (Print or Type)

Social Security Number

Date Signed

I, the undersigned a notary public in and for said county in said state, hereby certify that _____ whose name is signed to the foregoing Factor Concentrate Litigation Release and who is known to me, acknowledged before me on this date, that he/she had the opportunity to read the Release, and being informed of the contents of the same, he/she executed the same voluntarily on this date.

Notary Public
State of
My Commission Expires:

Signature

Name (Print or Type)

Social Security Number

Date Signed

I, the undersigned a notary public in and for said county in said state, hereby certify that _____ whose name is signed to the foregoing Factor Concentrate Litigation Release and who is known to me, acknowledged before me on this date, that he/she had the opportunity to read the Release, and being informed of the contents of the same, he/she executed the same voluntarily on this date.

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Notary Public
State of
My Commission Expires:

STATE OF LOUISIANA

PARISH OF ST. TAMMANY

22ND JUDICIAL DISTRICT COURT

SCOTT HARPER AND MULL & MULL,	*	NO. 98-10058
	*	DIVISION H
--vs.--	*	JUDGE _____
ALPHA THERAPEUTIC CORPORATION, BAXTER HEALTHCARE COMPANY, RHONE-POULENC RORER, INC., and BAYER CORPORATION	*	

****

ORIGINAL PETITION

DATE: January 6, 1998 FILED: _____

NOW INTO COURT, through undersigned counsel, come Scott Harper, an individual of the age of majority and a resident of California, and the law firm of Mull & Mull, a professional legal corporation licensed to do business and doing business in Covington, Louisiana (hereafter Mull & Mull"), who respectfully represent that the named Defendants herein are indebted unto them, jointly, severally and *in solido*, for the following reasons and in the following respects, to-wit:

1.

Made Defendants in this action are:

A. Rhone-Poulenc Rorer, Inc., parent of and Armour Pharmaceutical Company, a corporation organized to do business under the laws of the State of New York, licensed to do business and doing business in the State of Louisiana, and having as its national principal place of business the State of Pennsylvania;

B. Bayer Corporation, a corporation organized to do business under the laws of the State of Indiana, licensed to do business and doing business in the State of Louisiana, with its national principal place of business in the State of Indiana;

C. Baxter Healthcare Corporation, a corporation organized to do business under the laws of the State of Delaware, licensed to do business and doing business in the State of Louisiana, with its principal place of business in the State of Illinois;

D. Alpha Therapeutic Corporation, a corporation organized to do business under the laws of the State of California, licensed to do business and doing business in the State of Louisiana, with its principal place of business in the State of California.

2.

Venue over this petition for damages and to enforce a contract is proper pursuant to Louisiana Code of Civil Procedure Article 74 and Article 76.1.

3.

Defendants were and are manufacturers of Factor VIII and/or IX, a blood concentrate product designed to aid hemophiliacs in supplementing the enzyme necessary to clot their blood and prevent excessive bleeding.

4.

By virtue of written contingency fee contracts, Mull & Mull acted as attorney of record for the persons listed on Exhibit "A," attached hereto and incorporated herein for all purposes. Mull & Mull has asserted claims in Louisiana courts on behalf of the persons listed and against the Defendants for injury resulting from the Defendants' manufacture and sale of Factor VIII and Factor IX blood concentrate that was contaminated with the HIV virus.

5.

Defendants were aware that Mull & Mull represented these individuals at all time pertinent hereto.

6.

In January of 1996, Thomas W. Mull of Mull & Mull began negotiations with all four of the defendants on behalf of the firm's individual clients and on behalf of the Committee of Ten Thousand, a non-profit organization composed of affected members of the hemophilia community. After a series of lengthy meetings in March of 1996, Mr. Mull secured an offer of settlement from Baxter in the amount of $50,000 for each person infected with

HIV who had taken Baxter product, plus any attorneys fees that might be owed by such persons up the 1/3 of their recovery.

7.

Subsequently, both Alpha and Armour contacted Mr. Mull and proposed in principal to match Baxter's offer. This settlement would have meant that the defendants would pay each claimant $150,000 plus attorneys fees up to $50,000 in settlement of their claims.

8.

Prior to conclusion of the negotiations, however, Bayer contacted Mr. Mull and proposed that he abandon his efforts at negotiation with each defendant separately, in favor of a "global" settlement funded by all four defendants.

9.

Mull & Mull's resistance to such an approach was met by an assurance from Baxter and Cutter that the offer would be in an amount that they "could not refuse," which Mr. Mull assumed to mean that the offer would be in the neighborhood of the $250,000 settlements that the defendants had previously confected with the hemophiliac community in Japan.

10.

Defendants and their counsel then violated Rule 4.2 of the Model and Louisiana Rules of Professional Conduct by making a direct offer to plaintiff's clients, through a national advertisement in the Wall Street Journal, of a "global" settlement to all infected members of the hemophiliac community, which offer materially deviated from the terms of the negotiations that had previously been ongoing between Mr. Mull and the defendants, in the following respects:

A. Despite the fact that a previous national class action (*"Wadleigh v. Rhone-Poulenc Rorer, Inc."*) in favor of all persons to whom the offer was made had been decertified by the Seventh Circuit Court of Appeal on the ground of its inability to qualify under Federal Rule of Civil Procedure 23, which decertification had prompted the settlement discussions that had begun in January, the defendants proposed in their new offer to utilize the class action format once again, and this time to seek certification of a "settlement only" class which class would include all of Mull & Mull's clients who elected to participate, with class counsel to be the lead counsel for the Plaintiffs' Steering Committee ("PSC") in the new class action, despite the fact that said counsel had no relationship with nor authority to negotiate on behalf of Mull & Mull's clients, and acted only on behalf of those clients whom members of the PSC had personally undertaken to represent.

B. The offer was in the amount of $100,000 per claimant, "net of attorneys fees," up to a ceiling of $600,000,000, plus up to $40,000,000 in attorneys fees and costs, an amount significantly less than that to Baxter, Alpha & Armour had previously agreed.

11.

In May of 1995, the Plaintiffs Steering Committee had written a letter to all defendants, stating that the decertification of the *Wadleigh* class action meant that they no longer represented the interests of any member of the hemophiliac community. Nonetheless, the defendants disregarded this notification and communicated the offer of $600,000,000 directly to the members of the PSC in the decertified *Wadleigh* class action for acceptance.

12.

Subsequently, the Plaintiffs' Steering Committee publicly announced that it had accepted the defendants' offer on behalf of the hemophiliac community (even though it collectively represented no member of that community nor did it represent any organization of members of that community, such as the Committee of Ten Thousand) and that it would commence the required certification of the "settlement only" class necessary to facilitate the settlement.

13.

On April 15, 1997, a formal "settlement agreement" was signed by the defendants and representatives of the PSC, which settlement agreement attempted to abrogate any contingency fee contracts individual counsel such as Mull & Mull may have had with their clients. Said agreement further attempted to limit attorney recovery of fees to recovery from the $40,000,000 Cost and Fee fund.

14.

Subsequently, the Plaintiffs' Steering Committee filed a new class action (*"Walker"*), designated its lead counsel as "class counsel," and moved to certify a "settlement only" class under Federal Rule of Civil Procedure 23(b)(3).

15.

On August 14, 1996, the United States District Court for the Northern District of Illinois preliminarily approved the settlement, and authorized the mailing of notices to all putative class members affording them the option of accepting the settlement and their portion of its or alternatively pursuing separate claims. This order stated that the Court in the Northern District of Illinois would adjudicate attorney liens and contingency contracts.

16.

By the close of the opt-out period on October 15, 1997, approximately 6000 persons had accepted the

defendants' offer of $100,000, including 318 of Mull & Mull's clients.

17.

On May 8, 1997, the United States District Court for the Northern District of Illinois entered a Final Order and Judgment approving of the settlement to be paid to the claimants, certifying them as a "settlement class," and approving the $40,000,000 Cost and Fee Fund as a "fair and reasonable" amount to be paid to the attorneys involved. The MDL court further ruled that a separate order regarding attorneys fees would be entered on a later date.

18.

The defendants then vitiated and trammeled express orders of the United States District Court for the Northern District of Illinois that the monies tendered in settlement of the claim be distributed forthwith and in conformity with the process created by the Court and counsel for prompt distribution of said tender. They completely abrogated and ignored their attempted "class settlement" in favor of a procedure by which they would only distribute funds to the claimant, including plaintiffs' clients, after said claimant signed a "receipt and release" form which they concocted. Said form completely rejects any notion of a class settlement and attempts to negotiate and settle each individual claim per the terms of a private settlement between the individual claimant and the defendants.

19.

The requested release differs from the original notice sent to all claimants, and thus attempts to alter the terms pursuant to which the claimants accepted defendants' $100,000 offer of settlement, in the following respects:

A) While the original class of individuals included in the attempted class action, and thus those to whom notice was sent, only included hemophiliacs who had contracted HIV, the Release expanded the class of individuals covered to include individuals who had contracted any infectious disease as a result of infusing Factor VIII products;

B) While the original notice stated that one member of a "Claimant Group" – defined as all relatives or other individuals who had derivative damage claims arising out of the infection of a hemophiliac – could accept on behalf of the entire claimant group, and thus receive payment without consultation with other members of the Claimant Group, the final release states that all members of a Claimant Group must sign the Release before any member thereof may receive payment;

C) Although the original $100,000 promised to each claimant was "net of attorneys fees," and thus placed the burden on the defendants to satisfy the attorneys fees owed by individual claimants, the Release states that each claimant is responsible for his or her own attorneys fees and costs;

D) While the original notice shifted the burden of satisfying medical or other liens which

> third parties might have against the claimants' $100,000 settlement, the Release states that the claimant now bears the burden of satisfying any liens not previously settled by the defendants.

20.

Said "release form" includes language to the effect that:

> Releasors further represent and warrant that in agreeing to the terms of this Release, they have not relied on any finding of the fairness of the terms of the Agreement and/or this Release by any Court, including any determinations made by the Court in the *Walker v. Bayer Corp., et al.* action in the United States District Court for the Northern District of Illinois or in the MDL proceedings pending in that same court. Rather, Releasors have reached their own decisions as to the fairness of the Agreement and this Release in consultation with counsel of their choice or have voluntarily elected not to consult with such counsel. Releasors also represent and warrant that they are not relying on the Court's order barring the filing or pursuit of individual claims and they would agree to the terms of the Release even if the Agreement were not part of a class settlement *but rather a completely private settlement.*

(Emphasis added).

21.

Defendants demanded that each claimant sign the release form before said claimants could receive the $100,000 promised to them in the settlement agreement.

22.

The aforementioned Release delineates the defendants' intention to treat the Settlement Agreement as compromising 6000 individual lawsuits, including 318 of the suits filed by Mull & Mull, and not as individual suits in a larger class actions. Such intention is specifically demonstrated by their representation to the members of the putative class, including Mull & Mull's clients, that said release indicates the full extent of information upon which the settling claimants should rely, totally independent of any actions or proceedings taking place in the case known as *Walker v. Bayer Corporation, et al.*

23.

Defendants have paid the $40,000,000 ostensibly designated as the Cost and Fee fund, as well as the underlying $600,000,000 to be used in satisfaction of the individual claimants' claims, in an interest bearing account, disbursements from which they and Special Settlement Counsel David Higgins continue to control. Defendants have thus retained constructive and actual possession of the funds which they previously agreed would be used in satisfaction of the 6000 opt-in claims.

24.

Consistent with this abrogation of the class settlement in favor of individual "private settlements" independent of any class settlements, Mull & Mull formally asserted as against the defendants their rights to be paid contingency fees consistent with the contracts its made with those individual claimants with whom the defendants have seen fit to settle individually. Specifically, Thomas W. Mull of Mull & Mull sent to the defendants – through their counsel of record – formal assertions of liens against the defendants individually, by letter of August 15, 1997.

25.

Undersigned counsel further notified the defendants on behalf of Mull & Mull, by letter of November 24, 1997, addressed individually to the president of each of the defendant corporations, of Mull & Mull's assertion of its attorneys' fee lien rights against the defendants individually, subjecting both the defendants and the $40 million Cost & Fee Fund they created to the lien.

26.

On December 3, 1997, Mull & Mull further recorded its contingency contracts with the appropriate clerks of court and has complied with all prerequisites to the creation of attorney liens.

27.

Mull & Mull now possess a valid and enforceable lien, and has placed defendants on actual notice of said lien, pursuant to the provisions of law governing the instant contracts.

28.

Although Mull & Mull represented each of its clients and thus any negotiations concerning the payment of the settlement funds should have been conducted through it, the defendants continued to ignore the Rules of Professional Conduct and communicated with the firm's clients in a direct attempt to lure them away from representation by the firm. Specifically, Marianna Harper – the mother of Scott Harper, a claimant in the MDL – called Special Settlement Counsel David Higgins to determine why her son's settlement check had not yet arrived. Higgins informed her that the defendants had instructed him that her check would be processed and her settlement paid only if she fired Mull & Mull as her attorney of record.

29.

Only after Ms. Harper phoned Judge Grady – the district judge in charge of the Factor VIII MDL – and complained of the defendants' outrageous and unethical conduct did the defendants retract their previous position and agree to pay her even if she did not discharge Mull & Mull.

30.

The above and foregoing conduct renders the defendants liable unto Mull & Mull and the Scott Harper in the following respects and for the following reasons:

A) By settling with the claimants directly and not communicating with them through Mull & Mull, their counsel of record, defendants have rendered themselves liable to Mull & Mull for payment of all attorneys fees and legal costs which the claimants have incurred as a result of their contracts with the law firm, pursuant to the applicable law governing attorney liens;

B) By communicating directly with Mull & Mull's clients, in violation of Louisiana and Model Professional Rule of Conduct 3.3, defendants have wantonly and intentionally interfered with the contractual relations between Mull & Mull and its clients;

C) By attempting to confect a settlement class, when the defendants knew or should have known that such a class was rendered null by *Windsor v. Amchem Prod.*, in that the class attempted to be settled had previously been rejected as a settlement class, the defendants have abused the judicial processes to the detriment of the plaintiffs;

D) By attempting to confect a settlement class, when the defendants knew or should have known that such a class was rendered null by *Windsor v. Amchem Prod.*, in that the class attempted to be settled had previously been rejected as a settlement class, the defendants have abused the rights granted to

them by the courts and by their status as litigants and administrators of a settlement fund;

E) By attempting to limit Mull & Mull's recovery of its attorneys fees to the $40 million Cost and Fee Fund, and attempting to compel the United States District Court for the Northern District of Illinois to abrogate Mull & Mull's contingency contracts in favor of a fee ceiling imposed by the division of the Cost and Fee Fund, defendants have interfered with the contractual relations of Mull & Mull with its clients;

F) Said conduct referred to in (E) has further caused the defendants to attempt to intentionally, deliberately and wantonly convert the full extent of the contingency fees to which Mull & Mull is entitled as a result of their contracts with their clients, and have made them liable unto Mull & Mull pursuant to Louisiana Civil Code Article 2315;

G) By holding Scott Harper's settlement hostage and contending that they would pay it when and if he fired his counsel fo [sic] record, the defendants maliciously and willfully interfered with his contractual relationship with his attorney, causing him severe mental distress and anguish over whether or not he could receive what was rightfully his.

30.

Said conduct further breaches the contract between the claimants and the defendants, in which the defendants agreed to pay each claimant $100,000 "net of attorneys fees," and which condition constitutes a material portion of the contract between the claimants and the defendants. Said contract created a *stipulation pour autrui* in favor of the attorneys representing the claimants, obligating the defendants to pay the attorneys the fees to which they and their clients had previously agreed. Those parties now appear herein as stipulator and beneficiary to assert the breach of the *stipulation pour autrui.*

31.

The defendants' conduct has caused Mull & Mull damages in the amount of their contracts with their clients and in the expense and effort it has taken to attempt to redress the defendants' attempts to limit the available recovery of fees to which it is entitled. Said damages include the costs and fees incurred during this litigation, as well as various economic damages which will be demonstrated at a trial of this cause.

32.

Defendants' heinous and outrageous conduct has caused Scott Harper severe mental and physical anguish and distress, humiliation and embarrassment at the thought of losing his settlement check because he picked a lawyer the defendants did not like.

WHEREFORE, Plaintiffs respectfully pray:

I. That the Court order service of this Complaint to be had on the defendants, through their registered agent for service of process in the State of Louisiana, and that;

II. After due proceedings are had, this Court issue an order declaring Mull & Mull to have a perfected and enforceable lien against the defendants in the amount of its contingency contracts, and that;

III. The Court further cast the defendants in judgment, jointly, severally and *in solido,* to pay all fees set forth in Mull & Mull's contingency contracts with those clients who have accepted the defendants' individual settlement offers, and that;

IV. The Court cast the defendants in judgment, jointly, severally and *in solido,* to pay Mull & Mull damages for the intentional and wanton interference which the defendants have committed in the contractual relations between Mull & Mull and those claimants it represented, and for the conversion of the contingency fee to which Mull & Mull is entitled as a result of its contracts, and for any and all other acts of negligence and/or intentional harm which the defendants have inflicted on Mull & Mull and Scott Harper, and that;

VI. The Court further award the plaintiffs any and all attorneys fees, punitive damages, and any and all other relief and award

against the defendants, consistent with justice and equity.

Respectfully submitted,

/s/ Robert E. Arceneaux
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Attorneys for Plaintiffs

PLEASE SERVE all defendants,
through their agent for service of process:

C.T. Systems, United Plaza Blvd, Baton Rouge, LA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	)	JUDGE JOHN F. GRADY
SUSAN WALKER, Administratrix of the Estate of Steven Walker, deceased, Plaintiffs, v. BAYER CORPORATION, et. al. Defendants	)	MDL-986 No. 96-C-5024

ORDER

IT IS HEREBY ORDERED that Spece And Ibáñez's Expedited Motion for Correction And Modification of Record On Appeal is hereby granted, and further;

THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS IS HEREBY INSTRUCTED to enlarge the record to be transmitted to the United States Court of Appeals for the Seventh Circuit so as to include the items designated as follows:

(1) May 15, 1997, Order of Honorable John F. Grady.

(2) October 22, 1997, Memorandum of Points And Authorities In Support Of Response To Motion For

Enforcement Of Order; Counter Motion For Orders Setting Expedited Hearing, Requiring Payment Of Sanctions, Payment Of Settlement Monies, Payment Of Liens For All Claimants, Rescinding Clause Of Release Exonerating Governmental Bodies, And Taking Jurisdiction Of And Allowing Discovery On Plaintiffs' And Their Attorneys' Claims Of Fraud, Interference With Contract, Unjust Enrichment, And Breach of Contract.

(3) October 24, 1997, letter of Roy G. Spece, Jr., to Honorable John F. Grady.

(4) November 19, 1997, Reply To Fractionators' And MDL Lead Counsel's Response To Counter Motion For Orders Setting Expedited Hearing, Requiring Payment Of Sanctions, Rescinding Clause Of Releases Exonerating Government Bodies, And Taking Jurisdiction Of And Allowing Discovery On Plaintiffs' And Their Attorneys' Claims Of Fraud, Interference With Contract, Unjust Enrichment, And Breach Of Contract.

(5) January 8, 1998, Motion For Expedited Reconsideration Of Ruling That Clients Of Rose Marie Ibáñez and Roy G. Spece, Jr. Need Not Be Paid Settlement Monies Unless The Latter Promise Not To Argue To This Court – Or To Another Court Only If This Court Does Not Wish To Exercise Jurisdiction – That Defendants Might Be Liable To Them On Theories Other Than, Or In Addition To, Rights Arising Out Of An Ostensible Class Settlement Involving An Attorney Cost And Fee Fund, The Amount Of Which Was Dictated By The Defendants.

(6) January 14, 1998, Objection To Proposed Form Of Order.

(7) Claim Forms To Request Fees And Costs filed By Rose Marie Ibáñez And Roy G. Spece, Jr.

Chicago, Illinois the 21 day of May, 1998.

/s/ John F. Grady
JUDGE JOHN F. GRADY

cjud

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
John F. Grady

Sitting Judge if Other Than Assigned Judge

CASE NUMBER 96 C 5024 - (MDL 986)

DATE 5/26/1998

CASE TITLE SUSAN WALKER vs. BAYER

MOTION:

DOCKET ENTRY:

(1) ❑ Filed motion of [use listing in "Motion" box above.]

(2) ❑ Brief in support of motion due _____.

(3) ❑ Answer brief to motion due _____. Reply to answer brief due _____.

(4) ❑ Ruling/Hearing on _____set for _____ at _____.

(5) ❑ Status hearing [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ❑ Pretrial conference [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ❑ Trial [set for/re-set for] on _____ at _____.

(8) ❑ [Bench/Jury Trial] [Hearing] held/continued to _____ at _____.

(9) ❑ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to] ❑ FRCP4(m) ❑ General Rule 21 ❑ FRCP41(a)(1) ❑ FRCP41(a)(2).

(10) ■ [Other docket entry] Defendant's Motion to Modify Order of May 21, 1998 [ ] is allowed. The order entered on May 21, 1998 giving appellants' Spece and Ibanez leave to supplement the appellate record is hereby vacated and, in lieu thereof, the court now enters the alternative order submitted by the defendants, which grants Spece and Ibanez leave to expand the appellate record but does not include their claims for fees (item 7 of the May 21, 1998 order) which should not be part of the appellate record.

/s/ John F. Grady

* * *

✓ Notice faxed by judge's staff.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

IN RE: FACTOR VIII AND FACTOR IX CONCENTRATE LITIGATION	: MDL No. 986
JONATHAN WADLEIGH and JOANNE WADLEIGH, h/w, et al.,	
Plaintiffs,	
v.	: THIS DOCUMENT : RELATES TO:
RHONE-POULENC RORER, INC.; ARMOUR PHARMACEUTICAL COMPANY, INC.; MILES INC.; BAXTER HEALTHCARE CORP.; ALPHA THERAPEUTIC CORPORATION; and NATIONAL HEMOPHILIA FOUNDATION,	: Case No. 93-C-5969 : Judge John F. Grady
Defendants.	

FRACTIONATOR DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' Complaint and Motion for Class Certification fails to establish the prerequisites for class certification. The profusion of complex individual legal and factual issues to be resolved in each individual plaintiff's

claim as against any defendant clearly precludes certification. As this Court has noted in a similar context, "significant questions . . . of liability and defenses to liability will arise affecting only individual members of the [proposed] class in different ways." *Mink v. University of Chicago*, 27 Fed. R. Serv. 2d 739, 743 (N.D. Ill. 1979). Plaintiffs cannot meet their Rule 23(b)(3) burden of demonstrating that questions of law or fact common to members of the class *predominate* over questions relating solely to individual class members. Indeed, rather than providing for the efficient disposition of uniform claims, plaintiffs' proposed action would create a nightmare of individual minitrials involving myriad factual issues determined under the different substantive laws of fifty states. Such an action would be so unwieldy, confusing and inefficient that it could not provide adequate representation of the alleged thousands of class members by the individual plaintiffs, would prejudice the interests of the defendants, and would impose a tremendous burden on this Court's resources.

For a class action to be certified, Rule 23(b)(3) requires that common questions of law or fact predominate. Since plaintiffs have chosen to plead a nationwide class, the numerous permutations of the substantive law of all fifty states for each of plaintiffs' causes of action will cause individual questions of law to predominate over any common legal question. Even a partial overview of the legal issues involved in plaintiffs' claims reveals a profusion of differences between the states, making plaintiffs' proposed class both legally and practically untenable. Similarly, individual issues of fact, both as to liability and causation, will predominate.

A. Individual Issues of Law Predominate.

It is clear that there will be widespread diversity among members of the proposed class as to the legal standards that will be applied to establish liability or defenses. The Due Process Clause of the United States Constitution requires that for a forum state's substantive law to apply to a class member's claim, that state must have "significant contact or [a] significant aggregation of contacts" with the claim asserted by each class member. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). Moreover, in a nationwide class action, the forum state may apply its own law only after finding no material conflicts between its law and the law of other states. *Id.* at 818.

Plaintiffs make no contention that the purported class members who are not Illinois residents have any significant contact with the State of Illinois, or that there is no conflict among the various states' laws. Thus, the differing law of each of the 50 states would apply to the claims of the various class members.[1] *See Shutts*, 472 U.S. at 822. A separate analysis of the law for each of the fifty states (and the District of Columbia) would have to be conducted to determine the applicable law on at least the following issues: (1) the statute of limitations; (2) the negligence standard of care; (3) application of strict liability; (4) application of warranty theories; (5) the learned

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[1] As this Court observed in connection with a discussion of *Shutts* during the *Poole* trial, "if that is the law, then there can't be a class action." Tr. 31 (Appendix B).

intermediary doctrine; (6) third-party claims, contribution and indemnification; (7) contributory and comparative negligence; (8) assumption of the risk; (9) the recoverable elements of damages; (10) statutory caps on damages; and (11) availability of punitive damages. *See Abbent v. Eastman Kodak Co.*, No. 90-3436, slip op. at 13 (D.N.J. Aug. 28, 1992) (Appendix C).

Different common law requirements for proof of causation present even more problematic legal issues. For example, class members from Hawaii would presumably be entitled to proceed under a market share theory. *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 728 (Haw. 1991). Other states, however, have flatly rejected that doctrine. *E.g. Mowrer v. Armour Pharmaceutical Co.*, No. 92-6905, 1993 WL 542541 at *2 (E.D. Pa. Dec. 30, 1993) (Appendix D); *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 251, 560 N.E.2d 324, 337 (1990). Still others have never addressed the question or, if they have, have done so only in the unique context of DES, a generic drug which carried the identical risk of harm to each recipient. In Florida, the federal courts have split on the question of whether the market share theory embraced by Florida in DES cases extends to factor concentrates.[2] *Compare Kellar v. Cutter Labs.*, No.

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[2] Because a federal court sitting in diversity must apply the applicable law of the state as it exists (*Tidler v. Eli Lilly & Co.*, 851 F.2d 418 (D.C. Cir. 1988)), resolution of these issues relating to novel theories of recovery has prompted certification of questions to individual State Supreme Courts. Recently, for example, questions relating to the Idaho Blood Shield Statute and the availability of non-causation theories of recovery were certified by the federal court in Idaho to the Idaho Supreme Court in *Doe v. Cutter Biological*, No. 92-0434-S-HLR (copy

88-14059, slip op. at 8-11 (S.D. Fla. Feb. 24, 1992) (Appendix F), *summary judgment vacated on other grounds* (S.D. Fla. Sept. 1, 1992), *with Ray v. Cutter Labs.*, 754 F. Supp. 193, 196 (M.D. Fla. 1991) (Appendix G).

Similar questions will arise as to the application of such concepts as "alternative" liability or other "non-causation" theories. For example, in the *Poole* action this Court, applying Illinois law, found "alternative liability" applicable. Almost simultaneously, a federal court in Pennsylvania rejected application of the doctrine. *Mowrer*, 1993 WL 542541 at *3. Under the requirements of *Shutts*, a trial of claims coming from all fifty states and the District of Columbia would be dominated by this multitude of individual legal issues. It would be unrealistic to expect any judge or jury in a single class action trial to be able to apply these almost infinite permutations and combinations of the state law requirements applicable to each class member and defendant. The jury instructions alone, even if they could be formulated, would rival a torts treatise for length and complexity.

B. Individual Issues of Fact Predominate.

Plaintiffs have also failed to meet their burden of proof under Rule 23(a). Factual issues unique to each class member and that person's relationship with any defendant sought to be held liable are numerous, are in dispute, and clearly predominate. The factual basis for any possible liability for the HIV infection of any given

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attached as Appendix E). A motion to transfer that case is pending before the MDL Panel.

hemophiliac will depend on that hemophiliac's *totally unique* medical history, including such variables as: (1) the type of hemophilia he had; (2) how frequently and severely his hemophilia affected him; (3) when and how he was treated (including, at various different times, the general circumstances of his treatment and the level of knowledge of his physicians); (4) with which defendants' factor concentrates (if any) he was treated – and by which he allegedly was infected; and (5) when he was infected. Many hemophiliacs also have risk factors for AIDS other than their use of factor concentrates; as of last summer nearly one-third of adults with hemophilia and AIDS had such multiple risk factors (see pp. 11-16 below). Proof of these essential facts, as to any one hemophiliac, will prove *nothing* regarding those same questions as to any other hemophiliac. The allegations as to the named plaintiffs likewise do not support plaintiffs' contention that those claims are "typical" of the members of the proposed class or demonstrate that the named plaintiffs can provide adequate representation. Liability issues, as discussed below, likewise involve predominantly individual questions. In summary, there is no viable method by which such claims under these differing facts and states' laws could be tried to a jury in the context of a Rule 23 class.[3]

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[3] While some *discovery* issues may be common, the current MDL proceeding in this Court provides a method for realizing whatever economies may be achieved. *See In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989*, MDL No. 817, 1990 WESTLAW 6891 at *2 (N.D. Ill. Jan. 9, 1990) ("Class certification would merely impose additional administrative burdens without any countervailing benefits.").

It is not surprising that for these very reasons class certification has been denied in every other such case alleging transmission of HIV by factor concentrates.[4] Plaintiffs' motion in this case should also be denied.

STATEMENT OF FACTS

Because this Court is familiar with the background facts relating to hemophilia, its treatment, the development of heat-treated concentrates, and the developing medical and scientific knowledge regarding HIV and AIDS during the relevant periods of time, defendants will not include here a comprehensive Statement of Facts but submit as Appendix A to this brief a Statement of Facts summarizing such information.

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[4] *See, e.g., Gannon v. Cutter Labs.*, No. C-85-20078 WAI, slip op. (N.D. Cal. April 11, 1988) (denying class certification of class of hemophiliacs alleging HIV transmission through AHF concentrates) (Appendix H); *Doe v. Cutter Biological*, No. 87-0232, slip op. (D. Haw. Dec. 8, 1987) (same) (Appendix I); *Doe v. Sno-Isle Community Blood Bank*, No. 86-2-16308-5, slip op. (Wash. Super. Ct. King Cty. June 26, 1987) (same) (Appendix J); *see also Ray v. American Nat'l Red Cross*, No. 90-7942 (D.C. Super. Ct. Feb. 11, 1992) (denying class certification of persons alleging HIV transmission through transfusions of Red Cross blood between June 11, 1984 and March 1985); *McBarnette v. Feldman*, 582 N.Y.S.2d 900, 153 Misc. 2d 627 (N.Y. Sup. Ct. 1992) (denying class certification of patients treated by dentist who died from AIDS). Very recently, on February 18, 1994, an Ontario Canada court denied class certification in a similar action against the Canadian Red Cross. *Sutherland v. Canadian Red Cross Society, et al.*, No. 16523/93, Ontario Court (General Division), Feb. 18, 1994.

ARGUMENT

I. DIFFERING STATE LAWS APPLY AND PRECLUDE CLASS CERTIFICATION.

This case presents predominating individualized issues of law (in addition to the numerous individual issues of fact described below). It is unavoidable that, in a nationwide class, the Court would have to resolve each of the individual factual issues under the laws of as many as fifty states. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (constitutional limits on choice of substantive law preclude application of the forum state's law to class action claims which occurred in multiple states). The state law basis for the claims in this action make class action treatment not only inappropriate but, as a practical matter, impossible. *Coe v. National Safety Assocs.*, 137 F.R.D. 252, 254 (N.D. Ill. 1991) (state law claims were "inappropriate for class treatment, since the proposed class consists of citizens of at least forty-eight states, and plaintiffs' claim necessarily includes claims which arose in each of those states.")

Forum law could not be applied to all claims here. In *Shutts*, the Supreme Court held that in a nationwide class action, a forum state may apply its own law *only* after finding no material conflicts between its law and the law of other states. 472 U.S. at 818. The forum state must also find that it has a " 'significant contact or significant aggregation of contacts' to the claims asserted by *each member* of the plaintiff class." *Id.* at 821 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)) (emphasis added). In this case, most plaintiffs and class members have had no contact with Illinois. In addition, each count

of the complaint alleges claims based upon state law, which varies from state to state.

Plaintiffs cannot claim that there are no material conflicts of laws among all the relevant jurisdictions. Indeed, there is a bewildering variety of state law on the various claims asserted by plaintiffs, and there likewise are material conflicts regarding defenses raised by the various defendants. And although state tort law may be similar in some jurisdictions, even "widespread agreement" is not sufficient to warrant certification of a nationwide class. *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 265 (S.D. Cal. 1988) (citing *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987), *cert. denied sub nom Pinkey v. Dow Chem. Co.*, 484 U.S. 1004 (1988)); *see also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C Cir. 1986) ("Appellees see the 'which law' matter as academic. They say no variations in state warranty laws relevant to this case exist. A court cannot accept such an assertion 'on faith.' Appellees, as class action proponents, must show that it is accurate."), *cert. denied*, 482 U.S. 915 (1987).[5]

Even ostensibly discrete and limited issues, such as whether one or more of the defendants was negligent in its donor screening at a particular point in time, cannot be resolved for a class in a single proceeding because

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[5] Further, an individual analysis of each state's law will be required to determine necessary and indispensable parties to each of plaintiffs' theories of recovery, including, for example, whether the parties sued by certain of the named plaintiffs in their separately pending cases but not sued here are necessary parties under the applicable state's law. *See infra* note 9.

different states' laws impose different standards. California, for example, requires fulfillment of a professional standard of care. *Osborn v. Irwin Memorial Blood Bank*, 5 Cal. App. 4th 234, 271, 7 Cal. Rptr. 2d 101, 120-21 (Ct. App. 1992). Other states impose a "reasonable man" standard of care.

Because of the obvious problems involved, claims based upon state tort law generally are considered inappropriate for nationwide class-action treatment. *Coe*, 137 F.R.D. at 254; *see also Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1389 (7th Cir. 1990), (noting that dealing with multiple states' blue sky laws, especially in class actions, is a "nightmare"), *cert. denied*, 111 S. Ct. 2887 (1991); *Mink v. University of Chicago*, 27 Fed. R. Serv. 2d 739, 741 (N.D. Ill. 1979) (class actions are inappropriate in mass tort cases) (citing Fed. R. Civ. P. 23, Advisory Committee Official Comments). Class action certification is not proper in this case where numerous, differing state laws must be applied to numerous, individual claims.

II. QUESTIONS UNIQUE TO EACH PROPOSED CLASS MEMBER PRECLUDE THE NAMED PLAINTIFFS FROM SATISFYING THE REQUIREMENTS OF COMMONALITY, PREDOMINANCE, TYPICALITY, AND SUPERIORITY.

As every court deciding the issue has ruled, the highly individualized nature of AIDS/hemophilia litigation precludes representative plaintiffs from satisfying the remaining requirements of Rule 23. *See supra* note 4. "Failure to meet any of the requirements of Rule 23

precludes certification of a class." *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993).

In this case, plaintiffs cannot satisfy the remaining requirements of a Rule 23 class. In cases like this, where almost every facet of the litigation turns on facts and circumstances peculiar to each potential class member, the considerations relevant to typicality, commonality, and predominance tend to merge. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 158 n.13 (1982). They are, therefore, discussed collectively below.

A. **Questions Relating to Causation Are Unique to Each and Every Class Member.**

As plaintiffs' Lead Counsel in MDL-986 has written, the initial focus in AIDS/hemophilia cases is on causation. *See* David S. Schrager and Wayne R. Spivey, *Representing the "Innocent" Victims of HIV*, National College of Advocacy, Washington, D.C., October 16-18, 1991 [hereinafter Schrager & Spivey]. Causation involves numerous individualized and case-specific facts as to each plaintiff and each potential class member.

Each class member must first establish that he used the concentrate of the fractionator(s) against whom he seeks to recover and became infected with HIV through the use of such concentrate. Obviously, HIV can be transmitted in a number of ways other than the use of antihemophilic factor concentrates. Indeed, many hemophiliacs used blood products other than factor concentrates. According to recent data from the CDC, more than 31% of adult and adolescent hemophiliacs with AIDS were exposed to sources of HIV in addition to

factor concentrates. *See* July 1993 CDC *HIV/AIDS Surveillance Report* at 14, Table 12 ("Adult/Adolescent AIDS Cases by Single and Multiple Exposure Categories, reported through June 1993, United States") (attached as Exhibit 11 to Appendix A). Thus, whether a particular hemophiliac used other blood derivatives, or engaged in other conduct that presented a risk of HIV infection, is a factual question that can be resolved only on an individual basis.

In addition, treatment alternatives vary from patient to patient, depending on the severity of his hemophilia. Although severe hemophilia is and has been almost universally treated with blood factor concentrates since they became available, milder degrees of hemophilia A can be treated with other blood derivatives, such as cryoprecipitate. However, most severe hemophiliacs also have been treated with blood derivatives other than factor concentrates, including blood transfusions, cryoprecipitate, fresh frozen plasma, and packed red blood cells, all of which are potential modes of HIV transmission. Detailed proof regarding the individual medical history of each hemophiliac, therefore, is essential to establishing – or rebutting – causation in each case. Any finding that a fractionator's concentrate caused one hemophiliac's HIV infection would have no bearing on whether that fractionator (or any other fractionator) may have caused any other hemophiliac's HIV infection.

The degree of knowledge of a hemophiliac's treating physicians also bears on the issue of causation in each case. Blood factor concentrates are available only upon the prescription of a licensed physician. A pharmaceutical company's failure to warn (asserted in Count I of the

Complaint) cannot be the proximate cause of the injury if the prescribing physician was aware of and considered the risks associated with the use of blood factor concentrates in reaching a prescribing decision. Since these facts – what each plaintiff's treaters knew about AIDS transmission, and when – will typically be different, proof of causation cannot be determined *en masse*. The claims of thousands of alleged class members, and therefore the state of knowledge of each of their numerous treaters over their treatment histories, is an absolute obstacle to any common determination of each class member's cause of action.

Plaintiffs assert that this class would include individuals with both direct and derivative claims. Thus, there would be additional individual issues for each hemophiliac's parents, spouses, children and guardians. For example, named plaintiff Susan Collins alleges that she was infected as a result of intimate contact with her hemophiliac husband, presenting issues unique to her claim. Complaint ¶ 6. Clearly, the circumstances surrounding such alleged transmission, including knowledge of the hemophiliac's HIV status, discussions with treating physicians concerning potential transmission of HIV to a spouse, the precautions taken when engaging in intimate contact, and the spouse's other risk factors, would vary dramatically for each individual. Proof of all of these facts is entirely dependent on individual circumstances relating to each class member, for which any form of class resolution would be impossible.

Defendants submit that individual questions relating to causation, in and of themselves, require rejection of the

requested certification of a class. *See Doe v. Sno-Isle Community Blood Bank*, No. 86-2-16308-5, slip op. (Wash. Super. Ct. June 26, 1987) (Appendix J); *Doe v. Cutter Biological*, No. 87-0232, slip op. (D. Haw. Dec. 8, 1987) (Appendix I). In *Sno-Isle*, the court found that the following items requiring individual proof precluded certification:

> The fact that individual damages must be proven for each class member will not defeat class certification. In this case, however, each class member would need to prove in an individual trial at least the following:
>
> (a) what product he took and when;
>
> (b) what warnings he received;
>
> (c) what the state of medical and scientific knowledge was at the time;
>
> (d) whether he was made seropositive by the use of product or by another product, such as cryoprecipitate;
>
> (e) whether other parties failed to pass on warnings to him; and
>
> (f) the nature and extent of his individual damages.
>
> Most significantly, proof of each defendant's breach of duty, proximate causation and whether the concentrate was unavoidably unsafe at the time it was used would have to be tried separately for each member. Because of this, there would be no common nucleus of operative facts which could be resolved in a general trial applicable to everyone.

Slip Op. at 6-7 (holding that commonality, typicality, and adequacy requirements had not been met). Similarly, in *Doe v. Cutter Biological* the court recognized that:

> Any plaintiff in this litigation will have to establish, *inter alia*, what coagulation factor materials he took and when; what warnings his prescribing physician received or did not receive, and when; what information was available to plaintiff, and when; the state of the medical and scientific knowledge at those times pertinent to his claim; that the AHF factor concentrate he took was factually the cause of his injury; that the producer of that concentrate was negligent in one or more of the ways alleged; and that such negligence was the proximate cause of the particular plaintiff's injury. Proof of each defendant's breach of duty and whether that alleged breach proximately caused the injury claimed by a particular plaintiff would have to be tried separately for each plaintiff. These issues will have to be decided individually on a case-by-case basis.

Slip op. at 6. *See also Gannon v. Cutter Labs.*, slip op. at 8 (rejecting argument that class should be certified to consider "general causation" with respect to blood factor concentrates because "the determination of these issues will not determine whether the illness of any individual plaintiff was in fact caused by defendants' product") (Appendix H); *In re "Agent Orange" Prods. Liab. Litig.*, 818 F.2d at 165 (relevant issue is not whether Agent Orange has the capacity to cause harm "but whether it *did* cause harm and to whom. That determination is highly individualistic, and depends upon the characteristics of individual plaintiffs . . . and the nature of their exposure");

Mertens v. Abbott Labs., 99 F.R.D. 38, 41 (D.N.H. 1983) (finding that DES can cause injury would do nothing to advance the common cause of class members); *In re Tetracycline Cases*, 107 F.R.D. 719, 733 (W.D. Mo. 1985) (finding that whether tetracycline "can, in a general sense, cause tooth discoloration or damage" would not advance the case); *see also Spencer v. Central States Southeast & Southwest Areas Pension Fund*, 778 F. Supp. 985, 990-91 (N.D. Ill. 1991) (no typicality where class claims were based upon defendant's representations in 27 different union meetings and where reliance on representations would necessarily vary from individual to individual).[6] As the court noted in *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878-79 (D.S.D. 1982):

> To recover on her own claim, plaintiff must prove exposure to DES, identity of the manufacturer, fact of injury, its causation by DES, breach of duty or fault on the part of the manufacturer, and damages. Relevant issues are when the DES was taken by each mother of each plaintiff, the amounts of DES prescribed and taken, the duration of exposure, the stage in pregnancy when DES was taken, the adequacy of the warnings accompanying the various drugs of the various manufacturers, the specific warranty or representation made, and the reliance upon it.

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[6] *See also Morrissy v. Eli Lilly & Co.*, 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1st Dist. 1979) (denying DES class certification because of predominance of individual issues as to prescriptions, dosages, time of ingestion, patient histories, and alternative environmental exposures to carcinogens); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230, 233 (D.S.C. 1979) (finding no predominance in a DES case because of the existence of individual issues).

> Assuming plaintiff established each of the above elements with respect to her own claim, she would have proved nothing with regard to the claims of the other class members. A recovery by plaintiff would not entitle any other class member to a similar remedy, nor would it materially affect the merits of other members' claims.

The same is true here. Given the myriad factual differences among all putative class members regarding causation, class certification is not a viable option.

B. Questions Relating to Negligence Are Also Unique to the Claims of Each Individual Class Member.

Although these cases broadly involve a common topic – alleged transmission of HIV through blood factor concentrates – questions of negligence and liability are also highly individualized. Unlike "single-incident" mass tort cases involving nearly simultaneous injury to a group of people (such as an aircrash or hotel fire), these claims allege wrongful conduct by each of several defendants over many years and involve alleged injuries to different persons by different means and in different places at different times. Each fractionator has a distinct history regarding, among other things, AIDS-related research; licensing, marketing and labeling; plasma sources and screening; and viral inactivation procedures.

Moreover, antihemophilic factor concentrates are not fungible. As noted in Appendix A, each processor prepares its own concentrates according to its own proprietary processes. Each process was and is independently licensed by the FDA. Each process was developed and

implemented at different times. Each concentrate is produced from different pools of plasma, and the plasma collection procedures, locations, and donor pools were different for each fractionator. Even concentrates processed by the same fractionator at different times are not identical because different plasma collection and fractionation procedures were utilized over time and, of course, the plasma of different individual donors was utilized in processing different lots.[7]

Because of the differences between the blood derivatives at issue, the claims of each purported class member are governed by a standard of care which varies over time according to both the changes in the existing scientific knowledge and the specific derivative in question. Proof of liability in each separate case must focus on the state of medical and scientific knowledge at the time relevant to the hemophiliac's alleged HIV infection. That, in turn, will depend on the highly individualized proof of when particular hemophiliacs became infected.

Contrary to plaintiffs' apparent but notably unsupported suggestion, the fractionators could not have known of the possible cause of AIDS before it became known to the preeminent government and independent scientists conducting the research in this area. What a fractionator should have known and whether it should have taken additional steps to prevent the transmission of

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[7] Moreover, plaintiffs propose a class that would include users of two different concentrates. Factor VIII concentrates and Factor IX concentrates are not interchangeable. They are not processed by the same means or even by the same fractionators throughout the relevant time period.

HIV will also depend upon when the relevant concentrate was processed and used, which will necessarily be a separate factual determination in every case.

Every personal injury class action case cited by plaintiffs involved generic or identical products where the claim was that the product *itself* was inherently dangerous or posed the same risk of harm to the user. Unlike such "products" cases,[8] AIDS transmission is not an inherent property of plasma or factor concentrates. Rather, the claims of individual class members involve issues relating to particular lots that allegedly included the plasma of donors carrying HIV. Indeed, even receipt of factor concentrates which contain plasma from an HIV-positive donor do not necessarily cause the recipient to become infected. *See*, C.A. Ludlam et al., "Human T Lymphotropic Virus Type III (HTLV III) Infection in Seronegative Hemophiliacs After Transfusion of Factor VIII," *The Lancet* No. 8449, Aug. 3, 1985, Vol. II at 233-36. (Appendix K).

Moreover, courts have been reluctant to certify classes even in cases involving structurally or chemically identical products (such as the Dalkon Shield IUD or Hartz flea spray). *In re N.D. of California Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982) (despite common questions concerning the Dalkon Shield IUD, problems of commonality existed because of "different representations and warnings made to each woman,

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[8] Products liability theories, such as strict liability and breach of warranty claims, are unavailable under most of the applicable state blood shield statutes as is discussed in the defendants' respective motions to dismiss.

different injuries suffered, and different defenses available to [the defendant]"), *cert. denied sub nom A.H. Robins Co. v. Abed*, 459 U.S. 1171 (1983); *Ikonen*, 122 F.R.D. at 262 (despite common issues concerning manufacture of flea spray, "the individual case histories of the pets of each class member will all involve different negligence, strict products liability, breach of warranty, fraud, and adequacy of warning issues"); *Rosenfeld v. A.H. Robins Co.*, 63 A.D.2d 11, 16-17, 407 N.Y.S.2d 196, 199 (N.Y. App. Div.) (despite common issues relating to defectiveness of Dalkon Shield, individual proof required as to liability), *appeal dismissed*, 46 N.Y.2d 731, 385 N.E.2d 1301 (1978).

In fact, the alleged "common questions" set forth by plaintiffs as the basis of their certification request merely restate plaintiffs' theories of liability (*see e.g.*, Complaint ¶ 27(a), (b), (c), (d), (e), (f), (h)), the answers to which will be different for each plaintiff and each class member depending upon the applicable law and the unique facts of each claim. For example, whether the defendants adequately warned a hemophiliac's treating physician about the risks associated with the use of concentrate depends upon the state of medical and scientific knowledge at the time the concentrate was processed and distributed. Whether an allegedly inadequate warning was the proximate cause of an injury depends upon the level of knowledge of that physician, which will necessarily be different for each plaintiff and class member. Similarly, whether a fractionator acted reasonably with respect to the processing and distribution of its concentrate depends upon the state of knowledge at the time of processing of each particular lot of concentrate that a particular plaintiff or class member claims was contaminated with HIV. *See*

Ryan v. Eli Lilly & Co., 84 F.R.D. 230, 233 (D.S.C. 1979). Put simply, a finding of liability in one set of circumstances cannot establish liability in any other. Certification would do nothing to advance the cause of the individual plaintiffs or the proposed class members.

C. Damages Differ Dramatically for Each Class Member.

While causation and negligence issues involving each class member are all highly differentiated, damage questions are even more fact-specific. Plaintiffs try to lump all of the potential class members together under the heading "AIDS," suggesting that everyone with HIV suffers the same symptoms, or that all proposed class members otherwise are similarly situated. Such is clearly not the case. AIDS is a syndrome that results in the suppression of an individual's immune system. Some persons may be entirely asymptomatic for many years. Moreover, an individual wit HIV infection can develop a variety of medical ailments which are anatomically diverse, may involve a wide range of possible impairment, and receive different treatment and different symptomatic relief. In addition, each individual hemophiliac's family relationships and employment history may be affected by both his hemophilia and his HIV infection, and those issues can be resolved only on a case-specific basis.

Moreover, many putative class members – relatives and legal representative of hemophiliacs – do not have and will not develop AIDS. Instead, their damage claims are based upon their legal relationship to an infected or deceased hemophiliac. Although most of these are based

upon loss of consortium, which itself is highly fact-specific, many assert claims in their own right for, among other things, emotional distress and fear of contracting HIV. The nature and amount of claimed damages will obviously vary greatly from individual to individual. And, once again, determining the amount of damages for one individual would do nothing to resolve that question as to any other class member.

Plaintiffs have gone so far as to attempt to turn the issues of damages into one of their supposed "common questions" allegedly uniting the class:

> Whether plaintiffs and the member of the class have sustained injuries and damages and, if so, what the proper mechanism is for assessing and awarding damages and administering other relief, including relief to reduce the threat of future harm[.]

Complaint ¶ 27(g). But to combine a myriad of individual questions into one conclusory statement does not demonstrate commonality. A determination that a plaintiff has been injured (normally not a contested issue as to an HIV-infected hemophiliac) would do nothing to further the action as to other plaintiffs. The real question in each case, if causation and negligence can be established, is the *amount* of damages. As has been readily acknowledged since the birth of the class action device, this is not a "common" question at all; the amount of damages for each plaintiff and each proposed class member will vary distinctly from person to person, depending upon their individual circumstances and the state law that will govern their claims. The "proper mechanism . . . for assessing

and awarding damages" for each individual claim is thus individual treatment, not certification of a class action.

D. Questions Differ Between the Fractionator and Non-Fractionator Defendants.

Another confounding problem is that one of the defendants has never processed or distributed blood factor concentrates. Defendant National Hemophilia Foundation ("NHF") is not a pharmaceutical company; it is a not-for-profit association including individual hemophiliacs, hemophilia treaters, and others, none of whom are currently defendants in this action. Plaintiffs' claims against the NHF are radically different from those brought against the fractionators: They assert breach of a voluntarily assumed duty to provide advice, information, and medical recommendations *to its members* (Count IV).

Several local hemophilia organizations, none of whom are defendants in this action, are not affiliated with the NHF. For example, in New Jersey (the home of Plaintiff Martha Dougherty) the local hemophilia organization is neither related to nor affiliated with the NHF. Ms. Dougherty cannot have claims against the NHF under Count IV if she never was a member or received its "advice." Membership in the NHF, receipt or NHF materials, and reliance thereon, would have to be addressed as to each supposed class member.

III. NAMED PLAINTIFFS CANNOT SATISFY THE REMAINING REQUIREMENTS OF RULE 23.

Even if named plaintiffs could satisfy the Rule 23(b) requirements, they still bear the burden of satisfying the numerosity and adequacy requirements of Rule 23(a). *See Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir. 1984) (plaintiffs bear the burden of proving each of the requirements of Rule 23). Because they cannot satisfy their burden, this case cannot be maintained as a class action. *See Doniger v. Pacific Northwest Bell Inc.*, 564 F.2d 1304, 1308-09 (9th Cir. 1977); *In re No. Dist. of California Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d at 855.

Rule 23(a)(1) permits certification of a class action only if "the class is so numerous that joinder of all members is impracticable." Although the most obvious facet of the numerosity analysis involves the size of the class itself, speculation about class size is not enough. *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989); 7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1762 at 164 (1986). While plaintiffs speculate about the reasons more persons have not filed suit, the fact remains that only around 180 actions have been filed. This suggests that the majority of persons *who believe they have viable claims to assert* is much smaller than plaintiffs' speculation would suggest.

The numerosity requirement also involves a "subjective determination based on expediency and the inconvenience of trying individual suits." *Irving E. Schermer Trust v. Sun Equities Corp.*, 116 F.R.D. 332, 336 (D. Minn. 1987). Beyond mere numbers, a court should look at the type of action, the size of the individual claims, and the ability of

the proposed class members to maintain their own actions. *See In re Workers Compensation*, 130 F.R.D. 99, 104 (D. Minn. 1990); 1 Newberg & Conte, *Newberg on Class Actions* § 3.06, at 3-27 to 3-28 (3d ed. 1992); *see also Shutts*, 472 U.S. at 809 (class actions "permit the plaintiffs to pool claims which would be uneconomical to litigate individually"). Where the allegations include damages for serious injury and death, no such concerns exist as to the ability of the individuals to initiate lawsuits on a contingent fee basis. Many have done so (including plaintiffs separately represented by many of the lawyers now appearing as "class" counsel). Thus, regardless of how characterized, plaintiffs' purported class fails to satisfy the numerosity requirement of Rule 23(a).

Plaintiffs claim throughout their Memorandum that the confidentiality needs of the proposed class members, arising out of a "stigma" attached to HIV, are an additional basis for certification. *See, e.g.*, Plaintiffs' Memorandum at 2. However, the cease of identifying potential class members and determining their respective geographic locations, as well as the ease of effectuating notice and service upon them, are relevant to the numerosity analysis. *See Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986). Any desire for confidentiality on the part of the proposed class members thus weighs against certification, not in favor of it. Likewise, how can one "opt out" anonymously? Plaintiffs around the country who have desired to do so have filed their individual actions under pseudonyms. In fact, four of the nine "named" representative plaintiffs here who have separate lawsuits pending (Larry and Juanita Burr and Martha and Timothy Dougherty) have previously filed individual

actions using pseudonyms.[9] This has created no hindrance to the pursuit of their claims, and can be accommodated on an individual basis, but not in a class action.

With respect to the adequacy requirement, it is not enough that the plaintiffs may have retained qualified lawyers to handle their cases; the named plaintiffs must be able to adequately represent the proposed class. 7A Wright, Miller & Kane, *Federal Practice and Procedure*, § 1766 at 311 (1986). Contrary to plaintiffs' assertion at p. 12, n.3, "[t]he plaintiff [not the defendants,] carries the burden of showing that it will fairly and adequately represent the class." *First Interstate Bank of Nevada, N.A. v. Chapman & Cutler*, 837 F.2d 775, 781 (7th Cir. 1988).

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[9] Mr. and Mrs. Burr's action is pending in state court in Missouri under a pseudonym (No. 932-8155) and names as defendants Bi-State Hemophilia Association and the four fractionator-defendants here, but not the NHF. The Dougherty plaintiffs' action is pending under a different pseudonym in Middlesex County, New Jersey (No. L-8531-93) and names three medical providers and various "Doe" blood banks, clinics, hospitals, distributors and individuals, in addition to the four fractionators, but not the NHF. At least five other named plaintiffs have individual actions pending. Mr. Kuhn's separate individual action (No. H-93-3198 – consolidated) was transferred to this Court from the Southern District of Texas. It names the Institute of Hemotherapy in addition to the defendants here. Mr. Erickson also has an individual action pending in the Circuit Court of Cook County (No. 93 L 03704). It names Alpha, Baxter, Miles and Armour as defendants. Linda, Jerry L. and Jerry Grant Lewis have an action pending in state court in Texas (No. 9310438, Travis County, 250th Judicial District) against Austin Blood Components, Austin Plasma Co., Blood Components of San Antonio, Miles, Alpha, Baxter and Armour. The Lewis plaintiffs (but not the other plaintiffs in that case) have moved to dismiss their Texas claims.

In order to ensure adequate representation, first, "a named representative . . . must be injured in the same way as all members of the class." *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 505 (9th Cir. 1980). Second, as plaintiffs admit, the representatives' interests cannot be antagonistic to those of other members of the proposed class. Neither of these elements has been established by plaintiffs here.[10] Plaintiffs have failed to provide any information, either in their complaint or motion papers, as to when or from what blood derivatives the named plaintiffs allegedly contracted AIDS. Plaintiffs supply no facts to address the question of whether any one plaintiff was injured in the same way as other class members.

Furthermore, the significant differences among hemophiliacs with respect to the severity of their condition, methods of treatment, and the time when they seroconverted create obvious conflicts within the proposed class. Plaintiffs who used only Factor VIII have no cognizable interest in attempting to make a case involving Factor IX. Plaintiffs who used the concentrate of one fractionator have no legal interest in pursuing a case against the others. Plaintiffs who seroconverted at one time cannot represent the interests of those who seroconverted at another time and whose actions involve a different standard of care or are barred by the applicable

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[10] Plaintiffs address this issue in one conclusory paragraph at page 12 of their brief which provides no information necessary to determination of the issue. Defendants respectfully submit that prior to any finding that the named plaintiffs would provide adequate representation, defendants should be permitted to take discovery directed to the issues relevant to adequacy.

statutes of limitations. Plaintiffs with no affiliation with the NHF have no arguable interest in pursuing a suit against the NHF.

The named plaintiffs have already demonstrated that they have no interest in protecting any rights which class members may have against persons and entities not named as defendants in this action. This decision was made despite the recognition by at least one of the plaintiffs' attorneys that such rights should be explored and pursued:

> It is . . . prudent to explore the medical basis or indications on which Factor VIII concentrated product was recommended for infusion in a particular patient. If the client is a severe hemophiliac, as stated previously, there were few or no options and Factor VIII therapy was the medical standard. However, if the client is a mild hemophiliac, a fair question is presented as to why the Factor VIII concentrate was infused, particularly if the infusion occurred during and after 1984 when it was widely known that the infusion of blood or blood products carried with it the risk – in part uncontrollable, of HIV exposure. That is obviously more of a medical malpractice issue than a product liability theory.

Schrager & Spivey, *supra.* Indeed, plaintiffs Martha and Timothy Dougherty's individual action in New Jersey *does* name health care providers – claims which have apparently been abandoned here.

In their ardor to make this lawsuit look more like a potential class action, plaintiffs' counsel have ignored many possible causes of class members' alleged injuries and other causes of action they may have for redress.

This underscores the individual nature of these cases and the inadequacy of plaintiffs' proposed representation.[11]

IV. CLASS CERTIFICATION IS NOT A SUPERIOR WAY OF RESOLVING THESE HIGHLY INDIVIDUALIZED CLAIMS.

A class action would not be a superior method to the already existing alternative: MDL coordinated discovery followed by individual trails. If a class were certified here, the present lawsuit would inevitably degenerate into an agglomeration of separate tort claims arising out of factual circumstances unique to each class member under the law of each jurisdiction. For this critical reason, courts have refused certification in every single AIDS/hemophilia class action ever filed. *See supra* note 4.

Faced with similar actions involving multiple personal injury claims, most courts recognize the impossibility of managing class trials of individual claims. *In re Tetracycline Cases*, 107 F.R.D. at 724, summarized the governing law:

> Whether class certification has been denied on the basis of lack of commonality, typicality, or

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[11] That some of the named plaintiffs have engaged in "media campaigns" in direct, extra-judicial efforts to communicate with putative class members in no way supports their claim to be adequate representatives; indeed, such an attempt to undermine these proceedings dictates the opposite conclusion. *See, e.g.*, articles attached as Appendix L. *See also Poole*, Tr. at 18. (The Court: "[R]emind me of this if the time should come, if I do certify a class in a class action, no class representative is going to be one of those professional media persons regardless of motivation.") (Appendix M).

> predominance and superiority, most courts have exhibited great reluctance to certify a class in actions involving a number of defendants and exposure to the product in question over an extended period of time. . . . Usually, these courts have concluded that the individual nature of the proof as to liability, individualized questions as to affirmative defenses, and the absence of a single event causing the injury result in such a multiplicity of issues as to make class action treatment inappropriate or unworkable.

Thus, in *Kanon v. Brookdale Hosp. Medical Ctr.*, 87 Misc. 2d 816, 386 N.Y.S.2d 274 (N.Y. Sup. Ct. 1975), a case involving premature infants born in one hospital over a period of years who claimed damages as a result of negligent treatment with oxygen before birth, the court stated:

> [T]his matter would be unmanageable as a class action. . . . There appears to be no manageable way of trying as a class action all the potential claims of the class arising in various jurisdictions, at different times, at a time when the status of medical knowledge is different, when the dissemination of medical knowledge is at best questionable, when defenses and legal applications vary from case to case, and where proximate cause and the existence of damage in each case is an individual variable.

386 N.Y.S.2d at 276. *See also, Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566, 571 (E.D. Tex. 1974) (refusing to certify a class where "*uncommon* questions of law and fact would predominate over the common questions, and the case would therefore 'degenerate . . . into multiple lawsuits

separately tried' "; citing Rule 23, Notes of Advisory Committee).

In refusing to certify the plaintiff's product liability claims as a statewide (not nationwide) class on the issue of liability, the Ninth Circuit similarly stated:

> In products liability actions . . . individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.

Dalkon Shield, 693 F.2d at 853.

The alternative to a class action which already exists is far superior – an MDL capable of efficiently coordinating discovery in both federal and state cases, to be followed by individual trials of the plaintiff's unique claims in the transferor forum, presided over by a judge familiar with the particularized law of that state.

Contrary to plaintiffs' position, courts have not abandoned precedent, rejected the intent of the drafters of Rule 23, and ignored the management problems associated with certification in the personal injury context in favor of some "trend." Indeed, plaintiffs' cases actually support the general rule that personal injury actions are poor candidates for class treatment.

For example, in *In re "Agent Orange" Prods. Liab. Litig.*, the Second Circuit sharply criticized the use of class actions to determine "general" or "generic" causation issues in products liability cases, 818 F.2d at 164-65, upholding limited class certification only because of the potentially dispositive issue of whether the government's purchase and use of the product insulated the manufacturer from liability, *id.* at 166-67. Plaintiffs ignore that court's unequivocal statement that "[w]ere this an action by civilians based on exposure to dioxin in the course of civilian affairs, *we believe certification of a class action would have been error.*" 818 F.2d at 166 (emphasis added).

Plaintiffs' reliance on *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied sub nom., Anderson v. Aetna Casualty & Sur. Co.*, 493 U.S. 959 (1989), is equally misplaced. First, that action involved certification for settlement purposes, where "[t]he requirements for class certification are more readily satisfied . . . than when a class has been proposed for the actual conduct of the litigation." *White v. National Football League*, 822 F. Supp. 1389, 1402 (D. Minn. 1993). Moreover, the only issue for which class treatment was deemed appropriate was whether the defendant's insurance carrier could legally be held liable as a "joint tortfeasor" with A.H. Robins, not whether the product itself was responsible for the claimed injuries. *In re A.H. Robins Co.*, 880 F.2d at 747. The court observed that if the carrier were not found to be a joint tortfeasor, all of the class members' claims would fail. *Id.* at 741. Plaintiffs also fail to note that the carrier had agreed, if it were found to be responsible, "not . . . [to] litigate separately any of the non-common issues of individual medical causation and individual

amounts of damages" instead agreeing to provide class members with an abbreviated right to recovery through a "Claims Resolution Facility." *Id.* at 743.[12]

Contrary to plaintiff's suggestion, litigation involving blood factor concentrates poses no looming threat to the federal judiciary. Unlike the administrative morass created by asbestos litigation, which caused the 5th Circuit to approve class certification where over 20,000 actions had been filed, *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir.), about 180 individual lawsuits concerning AIDS and hemophiliacs have been filed in various state and federal courts. This likely reflects the fact that the vast majority of those hemophiliacs who contracted HIV through the use of AHF concentrates are seroconverted by 1982, when neither the cause nor mode of AIDS transmission had yet been discovered. There is also no reason to expect a future explosion in litigation, because current processing techniques prevent HIV transmission. Thus, the certification of the class also raises the concern that it will encourage the filing of relatively weak or meritless claims which would dilute the claims of others. *See Ikonen*, 122 F.R.D. at 265.

Similarly, in another decision cited by plaintiffs, in certifying the class of residents surrounding a landfill which had allegedly contaminated the area's water supply, the court conceded that:

> In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no

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[12] The court was also clearly concerned with the fact that there were over 300,000 claims for recovery. 880 F.2d at 741.

> single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy.

Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988). Because blood factor litigation clearly involves all of these individual issues, plaintiffs' reliance upon *Sterling* is misguided. *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58 (S.D. Ohio 1991), is likewise distinguishable because no individual medical claims were asserted in that case. *Id.* at 65.

Plaintiffs' remaining citations to asbestos property damage cases are completely inapposite, because in each of those cases the court expressly noted that although certification posed significant management problems, the unusual nature of asbestos litigation heavily influenced their decisions. *In re School Asbestos Litig.*, 789 F.2d 996, 1011 (3d Cir.), *cert. denied sub nom. Celotex Corp. v. School Dist. of Lancaster*, 479 U.S. 852 (1986); *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 182 (4th Cir. 1993). Thus, plaintiffs' own cases support the rule that class treatment is generally inappropriate in personal injury actions.

In addition to the overwhelming management problems typical of such actions, certification in this context raises sensitive concerns peculiar to the nature and public perception of HIV that cannot and should not be ignored. By seeking class certification plaintiffs are necessarily asking the Court to invade the personal lives of HIV-infected hemophiliacs and their families. They are asking

the Court to require all such persons to come forward and disclose their sexual histories and medical conditions, and whether or not they have AIDS. They are also asking this Court to force them to sue the companies that process the concentrates which are keeping many of them alive. This seems especially peculiar, given plaintiffs' professed concern with the privacy of others.

Whether to become a litigant in a major personal injury action is a significant personal decision which should be left to each individual to make, in consultation with his family, medical advisors and counsel. If he wants to sue, he has that remedy available and is free to name those defendants he has claims against and to sue in a court of his own choosing. Denying class certification here will impair none of his rights; granting certification will certainly do so. *See Mink*, 27 Fed. R. Serv. 2d at 743 n.6 (certification could bar the claims of some class members because of res judicata) (citing *Hansberry v. Lee*, 311 U.S. 32, 41 (1940), and *Cartolano v. Tyrrell*, 421 F. Supp. 526, 530 (N.D. Ill. 1976)).

Class certification here would also pose serious concerns for the hemophilia community. In addition to the privacy implications, certification may create an adversarial relationship between hemophiliacs and the health care professionals on whom they rely (all of whom will necessarily be drawn into the morass of discovery which certification would generate), and would create the need for individualized counsel and advice for each potential class member. There are many, many reasons not to certify this case as a class action, not the least of which are the needs and interests of the potential class members themselves.

CONCLUSION

As the cases discussed above all confirm, potentially serious personal injury claims arising in different places and at different times are particularly ill-suited for class action treatment. Plaintiffs propose that this Court embark on what one judge has called "a trial court's nightmare of a litigation monster." *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 277 (D.D.C. 1990), *appeal dismissed*, 945 F.2d 1188 (D.C. Cir. 1991). When the individual issues of law are compounded by the individual issues of fact, the conclusion is inescapable: The named plaintiffs *cannot* establish the prerequisites for class certification in this case, and their Motion for Class Certification should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sara J. Gourley, certify that I caused a copy of the foregoing Fractionator-Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification to be served by Federal Express upon all counsel on the attached service list outside of Chicago, Illinois, and by messenger to counsel in Chicago, Illinois, this 28th day of February, 1994.

/s/ Sara J. Gourley
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